

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

PFLAG, Inc., et al.,)
Plaintiffs,)
vs.) CIVIL CASE NO. 8:25-cv-00337-BAH
DONALD J. TRUMP, et al.,)
Defendants.)

THURSDAY, FEBRUARY 13, 2025
Courtroom 1A
Baltimore, Maryland

MOTIONS HEARING

BEFORE: THE HONORABLE BRENDAN A. HURSON

On Behalf of the Plaintiffs:

JOSHUA BLOCK, ESQUIRE
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, NY 10004

OMAR GONZALEZ-PAGAN, ESQUIRE
Lambda Legal Defense & Education Fund, Inc.
120 Wall Street, 19th Floor
New York, NY 10005

LAURA EDELSTEIN, ESQUIRE
Jenner & Block, LLP
525 Market Street, Suite 29th Floor
San Francisco, CA 94105

On Behalf of the Defendants:

HARRY GRAVER, ESQUIRE
Jones Day
51 Louisiana Avenue, N.W.
Washington, D.C. 20001

MOLISSA FARBER, ESQUIRE
S. NICOLE NARDONE, ESQUIRE
36 South Charles Street, 4th Floor
Baltimore, MD 21201

(Computer-aided transcription of stenotype notes.)

P R O C E E D I N G

1:04 p.m.

THE CLERK: The matter now pending before this Court is Civil Action number BAH-25-00337, PFLAG, Inc., et al., versus Donald J. Trump, et al. This matter comes before this Court for the purposes of a motions hearing.

Counsel for the record starting with the Plaintiffs.

MR. BLOCK: Good morning, Your Honor. Joshua Block from the ACLU on behalf of the Plaintiffs. And I'm -- with me is my co-counsel Mr. Gonzalez-Pagan.

THE COURT: Nice to see you.

MR. GONZALEZ-PAGAN: Good morning, Your Honor, Omar Gonzalez-Pagan on behalf of the ACLU for the Plaintiffs.

THE COURT: Nice to see you.

MS. EDELSTEIN: Good afternoon, Your Honor. Laura Edelstein from Jenner & Block on behalf of the Plaintiffs.

THE COURT: All right. Nice to see you.

The Government?

MR. GRAVER: Hi, Your Honor. Harry Graver for the United States.

THE COURT: Nice to see you.

MS. FARBER: Good afternoon, Your Honor. Molissa Farber for the Defendants.

THE COURT: Nice to see you.

MS. NARDONE: Hi, Nicole Nardone for the Defendants.

1 THE COURT: All right. Nice to see you as well.

2 All right. I brought a lot of paper down here so give me a
3 second to get this -- I probably won't look at any of it, but...

4 First and foremost, I want to thank everybody for being
5 here. This is obviously on a bit of an accelerated tract and
6 it's not easy to pick everything up. And I'm sure there's a lot
7 of writing done at night and a lot of conversations, a lot of
8 meetings, a lot of Googling -- me and others. It's hard,
9 regardless of what side you're on, so I really appreciate the
10 effort that everyone has taken to get us here today.

11 And for the folks in the audience, welcome. More people
12 will be flooding in, and unfortunately the courtroom is a little
13 bit difficult to access, but thank you for being here.

14 I know some people were out front earlier exercising their
15 First Amendment rights, that's fantastic. And welcome here to
16 the U.S. District Court for the District of Maryland, the third
17 branch of Government. For some of you, you probably haven't
18 been here before, maybe some of you have. But a couple ground
19 rules. One, no cell phones allowed. They should have been
20 taken outside, but no filming or recording or anything like that
21 is permitted.

22 Second, it is completely fine and normal to be affected by
23 what's being argued today. We all know the issue at stake here
24 today and it's very personal to some people here. Watching that
25 is completely not just fine but acceptable, if not normal, to

1 have a reaction to it. But what we can't have in the courtroom
2 is any outbursts or audible reactions. We have to decide this
3 case and argue this case on the papers and the arguments that
4 the lawyers make. So I trust that everyone will, despite their
5 feelings one way or the other, do their best to keep those
6 feelings inside for now. And when the case is over and you head
7 outside, feel free to talk about it, say whatever you want, but
8 certainly I appreciate your efforts to maintain the decorum in
9 the courtroom.

10 And if you need to leave at any time, that's completely
11 fine. I think only this door is open (indicating), so please
12 come down this way.

13 If you have anything here that -- anything in the courtroom
14 that's making you uncomfortable or you need the assistance of
15 any of the staff here, we have our U.S. Marshals who are here
16 wearing clothing that generally identifies them, or our CSOs.
17 If you have any complaints or issues, or you're feeling
18 uncomfortable or intimidated, feel free to go talk to the
19 courtroom security or the U.S. Marshals.

20 That does not apply to the lawyers. If you're feeling
21 uncomfortable or intimidated, there's nothing I can do to help
22 you.

23 (Laughter.)

24 THE COURT: Finally, we have a press room where the
25 proceedings are essentially being simulcast so press can take

1 notes and use their laptops. I'm assuming that connection is
2 working. If for some reason it isn't --

3 It is working? Okay. Our deputy has it.

4 So without further ado, let me get into where we are and
5 why we're here.

6 On January 20th, 2025, President Trump issued Executive
7 Order 14,168, which is entitled "Defending women from Gender
8 Ideology Extremism and Restoring Biological Truth to the
9 Federal Government." I'll generally refer to it as the Gender
10 Identity Order.

11 To achieve the stated objective in that order, which is
12 essentially eradicating gender ideology, section 3(g) of the
13 Gender Identity Order declares, "Federal funds shall not be used
14 to promote gender ideology."

15 The gender ideology order directs that, "Each agency shall
16 assess grant conditions and grantee preferences and ensure grant
17 funds do not promote gender ideology."

18 The Gender Identity Order cites, "The Constitution and laws
19 of the United States of America, including section 7301 of Title
20 5 of the United States Code as the authority by which the
21 President promulgated this order." Now, so we're clear, 5
22 U.S.C., section 7301 permits the President to, "Prescribes
23 regulations for the conduct of employees in the Executive
24 branch."

25 On January 28th, 2025, President Trump issued Executive

1 Order 14,187 entitled "Protecting Children From Chemical and
2 Surgical Mutilation," which I'm going to generally call the
3 Denial of Care Order or Protecting Children, or depending on how
4 the questioning goes we'll call it one or the other. But either
5 way, that order directs all federal agencies to, quote,
6 "Immediately take appropriate steps to ensure that institutions
7 receiving federal research or education grants, and the chemical
8 and surgical mutilation of children."

9 That order cites, quote, "The authority vested in the
10 President by the Constitution and the Laws of the United States
11 as the authority by which the President has promulgated this
12 Executive Order."

13 Now, according to the Plaintiffs, and this is a quote from
14 their pleadings, "President Trump unilaterally directs that all
15 federal medical and research grants be stripped from medical
16 institutions, medical schools, and hospitals that provide
17 medically necessary gender-affirming medical care to patients
18 under 19 for the purpose of gender transition regardless of
19 whether funds are used for or related to that care."

20 Now the Defendants contend, "That the Executive Orders do
21 not purport to withhold all federal funding if an institution
22 promotes gender ideology or provides the referenced treatment,
23 but instead only instructs agencies to implement the President's
24 policy preference to the extent permitted by applicable law."
25 And that's a quote from their response to the temporary

1 restraining order motion.

2 Now Plaintiffs allege that the Defendant Health Resources
3 and Services Administration, HRSA, immediately after these
4 orders were implemented or published, immediately went about
5 enacting the order by sending an email warning the institutions
6 receiving government funds cannot use them for gender-affirming
7 care for people under the age of 19.

8 Now apparently, I've learned from the reply brief that the
9 Plaintiffs have filed, that the CDC has followed suit with a
10 directive of its own. The result, the Plaintiffs have alleged,
11 is essentially a ban on gender-affirming care for minors that
12 has essentially spread across the nation; admittedly sort of
13 haphazardly from institution to institution to institution. And
14 that this has impacted both the named Plaintiffs in this case
15 and the associations that are represented as Plaintiffs here.

16 Now today we're really here talking about three of the
17 Plaintiffs' claims. One is an ultra vires allegation that the
18 President has acted in excess of the President's authority by
19 usurping the legislative function and violating bicameralism and
20 presentment clauses essentially by doing on his own what
21 Congress is supposed to do.

22 The second and third allegations relate to discrimination.
23 Specifically, one, that these orders are ultra vires in that
24 they direct agencies to implement these orders that conflict
25 with antidiscrimination statutes, both the Affordable Care Act

1 or the ACA, and the Public Health Services Act or the PHSA.
2 Both of these acts have their own antidiscrimination provisions
3 that the Plaintiffs allege the Executive Orders require
4 hospitals and other institutions to violate.

5 And finally, there's an allegation that the Executive
6 Orders essentially violate equal protection by discriminating,
7 both on the basis of transgender identity and on the basis of
8 sex.

9 The reason we're here today is not to try this case
10 entirely. It's not to present witnesses testimony. It's to
11 decide the question of a temporary restraining order. We'll
12 talk a little bit more about logistics, but to achieve a
13 temporary restraining order, to attain one, the Plaintiffs have
14 to establish four factors.

15 First, they have to establish that they are likely to
16 succeed on the merits of just one of their claims.

17 Second, they have to show that they are likely to suffer
18 irreparable harm if the relief they're asking for is not
19 granted.

20 Third, they have to show that the balance of equities
21 favors them.

22 And fourth, that the injunction is in the public interest.

23 However, it is clear in the case law, and no one seems to
24 dispute, that when a government entity, as is the case here, is
25 a party, those last two factors merge.

1 So this motion is the Plaintiffs' motion, and they have
2 requested, and I have approved, that they will split up the
3 arguments, with Mr. Block sort of handling the question of
4 separation of powers and Mr. Gonzalez-Pagan handling the
5 question of equal protection and the violation of the statutory
6 laws.

7 Government, I never inquired as to whether you're splitting
8 up the response. No? You're just going to handle it all.
9 Okay. No issues there.

10 So I think the best way to do it would more than likely be
11 to have Mr. Block begin, and then you respond to the Separation
12 of Powers arguments and then move onto the second.

13 Some of these things tend to fall on each other and we may
14 end up talking about everything at once. But the important
15 thing here is that you get your arguments out, not that you
16 please me in the order and manner that you do it.

17 So why don't we start here. You're welcome to come to the
18 podium or argue from there, whatever is easier for you. I will
19 cut you off with questions; I generally do that.

20 MR. BLOCK: Thank you, Your Honor.

21 I'll also be addressing the Threshold Issues of
22 Justiciability and the Scope of Relief.

23 THE COURT: Sure.

24 MR. BLOCK: So I'll begin with the Threshold Issues of
25 Justiciability.

1 President Trump, as Your Honor noted, issued the Denial of
2 Care Order to instruct federal agencies to, quote, "Immediately
3 take appropriate steps to ensure that institutions receiving
4 federal research or education grants, and gender-affirming care
5 for people under 19."

6 And that order had immediate consequences. That night,
7 according to the declaration of Dr. Pogue that we have in our
8 reply, Childrens Hospital, within hours, sent a notice to
9 medical staff to end providing care.

10 The following day our Plaintiffs, whose separations are in
11 the records, received phone calls from Childrens Hospitals in
12 D.C., in Boston, and elsewhere cancelling their appointments.
13 New York is elsewhere. Since that day more and more hospitals
14 have responded with closures.

15 The Governor of Virginia, noting that the Executive Order
16 went into effect immediately, has instructed all hospitals in
17 Virginia to cease care, and they have done so. We have clients
18 who traveled to Maryland in order to escape state laws banning
19 gender-affirming care, only to have their care canceled here.
20 And when they tried to make alternate arrangements to go to a
21 Childrens Hospital in L.A., were told that because of this very
22 same order Childrens Hospital L.A. is not accepting new clients.

23 If there were any doubt that this order was intended to
24 have immediate effects, it's been removed by the actions of the
25 Government, both in the termination notices they sent and in the

1 President's press release celebrating the closure of these
2 hospitals.

3 Now the Government responds to the reality of what happened
4 by pointing to a boilerplate statement in the Executive Order
5 saying that they should only be implemented consistent with
6 applicable law.

7 The Fourth Circuit has directly on-point precedent from the
8 HIAS case saying that when the text of an order is itself
9 facially and plainly unlawful, that sort of boilerplate
10 statement can't allow the Executive to evade judicial review.

11 THE COURT: Have you ever seen an order that says
12 please implement this by violating the law?

13 MR. BLOCK: I have not, Your Honor. We might see one
14 but I have not yet.

15 THE COURT: I certainly hope not. But my point is
16 simply to say that this language seems to be fairly standard in
17 Executive Orders regardless of what they are.

18 MR. BLOCK: And the context here is also important.
19 At the same time that this Executive Order went out the
20 Administration had a general pause issued by OMB that was
21 halting payments left and right. So I think it was a very
22 credible threat, and understandable for certain hospitals to
23 fear that what the President was ordering was that payments be
24 cut off immediately outside of the appropriate channels of
25 administrative law. And that is precisely what happened when

1 HRSA issued it's notice and when CDC issued their notice.

2 The text of these notices are important. They don't say we
3 are initiating the process of cutting off your grant, they say
4 you must immediately halt using any funds in a way that
5 conflicts with the Executive Orders. And, you know, the CDC
6 notice, at the very end, I think eliminates any doubt about
7 whether this is ripe or whether there's, you know, quote, "Final
8 agency action here." Because at the very end it says -- it says
9 -- it says, "Any vestige, remnant, or remaining piece of any
10 gender ideology programs funded by the US Government under this
11 award are immediately, completely, and permanently terminated."
12 which sounds like, you know, final agency action to me if such a
13 requirement applied here.

14 THE COURT: So I guess it might beg the question then,
15 why isn't there an APA claim? And now there's an amended
16 complaint. No one has really raised the idea that there is an
17 amended complaint. I was curious what impact that has, if any,
18 on today. But more so, why is there not an APA claim based on
19 the HRSA email and the CDC -- what are we calling that, a
20 letter?

21 MR. BLOCK: I would call it a notice.

22 THE COURT: Okay.

23 MR. BLOCK: Well, Your Honor, to answer the first
24 question about the amended complaint, we did have a plaintiff
25 who wished to not proceed in their individual capacity. And so

1 their declaration is still there as a member of PFLAG but we
2 wanted to amend the complaint as soon as possible to address
3 that.

4 we'd be happy, Your Honor, to have in the alternative an
5 APA claim. Of course, you know, here the only cited authority
6 for any of the actions are the President's Executive Orders that
7 say you may not take any action inconsistent with the
8 President's orders. They don't purport to be applying any
9 statute, any delegated power to the agency. And, of course, you
10 know, not every agency -- we don't know the extent of the
11 activities of every branch of HHS or every branch of the
12 government that's issuing notices or terminating grants for
13 other reasons.

14 So we think that the granting of equitable relief is a
15 completely appropriate and well-settled means for this Court to
16 stop lower executive branch officials from carrying out unlawful
17 orders. But in the alternative, if the Court wants to construe
18 it as an APA claim we wouldn't object to that either.

19 THE COURT: And you'd be essentially saying it's
20 arbitrary and capricious because it violates the law.

21 MR. BLOCK: Yeah, it would be. It's contrary to law
22 and also that it's arbitrary and capricious. It doesn't -- of
23 course, under arbitrary and capricious review the agency has to
24 consider important aspects of the problem. This notice is
25 consider nothing other than the fact that they ostensibly

1 conflict with the President's orders.

2 That segues into the ultra vires claim, unless Your Honor
3 has more questions.

4 THE COURT: No. I think all of these things layer a
5 little bit, but I'll certainly ask the Government a little bit
6 about the argument that nothing has happened because I can't
7 support that. Based on this record it seems clear that this
8 order has had immediate effects.

9 I do want to ask one question, and I'm going to ask the
10 Government too. In the Government's brief they note that the
11 HRSA email has been rescinded. What does that mean to you? Was
12 there a follow-up email? Was there a public announcement? What
13 was there?

14 MR. BLOCK: I believe that there was an email sometime
15 last week. It might have been after our status conference
16 actually, or thereabouts. There's an email saying please
17 disregard the previous message, and that was it.

18 I will note that that HRSA initial termination notice, it
19 cites several reasons that grants were being terminated. Some
20 of them were the Gender Identity and Denial of Care orders but
21 one of them was also the OMB pause memo. And so it seems likely
22 to us that it was rescinded, or I would say temporarily
23 withdrawn, to comply with the injunction from the District Court
24 in Rhode Island.

25 Of course, the Government, you know, is appealing that

1 injunction and seeking, you know, immediate stays of it. And so
2 we don't think that that injunction, you know, provides us the
3 necessary protection we need here. But I think that is probably
4 the likely reason.

5 THE COURT: But it's clear that that rescission, such
6 as it is, did not say you may continue providing
7 gender-affirming care to minors, we are simply in the process of
8 investigating potential policies or regulations that will bring
9 about the President's desired result, but it didn't say anything
10 like that.

11 MR. BLOCK: No. No, absolutely not.

12 And I think it's very telling here that at no point, either
13 in the Executive Orders or any communications from the agencies,
14 has anyone cited the actual statute pursuant to which agencies
15 are authorizing these grants in the first place. You know, of
16 course grant statutes, they have specific criteria; they award
17 grants for specific purposes. There's been no attempt by the
18 Government in their opposition to cite any grant statute as
19 authorizing what they've done.

20 This is an across the board, you know, cut-off or
21 declaration that funds will be withheld across all grants,
22 across all programs simply because an entity provides
23 gender-affirming medical care to people under 19.

24 THE COURT: Well, to be fair to the Government, I
25 didn't see much of a cite to specific funding streams from your

1 side either and I was wondering if that matters. I mean, on my
2 own I saw the Affordable Care Act provided, in very vague terms,
3 blanket funding that I think is at this point 5 billion? I got
4 lost in the zeros. But it was sort of ratcheting up every year.
5 I didn't follow the funding in the other law. But, in essence,
6 does it matter if we don't know the specific stream?

7 MR. BLOCK: I don't think so, Your Honor, because I
8 think we're responding to the order that's been executed. And
9 that order is an across the board order.

10 If an agency wants to initiate rulemaking or go through the
11 regular procedures for saying that statute X authorizes us to
12 withhold funds based on Y conditions, or even that statute X
13 delegates to us discretion to consider this issue, then that
14 would be another matter. We would look at the actual statute.
15 We would see whether, you know, the express or implied will of
16 Congress precluded the Government from imposing this criterion
17 on the grants.

18 I do have to say that I can't envision a world in which
19 this criteria of don't provide gender-affirming medical care to
20 minors, even with your own funds, has any rational relationship
21 to the Congressional purposes in enacting these grants. It's
22 significant. This goes even beyond the Hyde Amendment which
23 prohibits use of federal funds to provide abortion care. That
24 is still limited to any use of their own funds. This is
25 incredibly sweeping.

1 THE COURT: Okay. Please continue.

2 MR. BLOCK: So in terms of how that relates to the
3 Separation of Powers argument, all power to, you know, enact
4 legislation has to come from Congress and be signed by the
5 President. That also includes grant authorizing statutes and
6 appropriations bills. Congress has shown that it is completely
7 able to attach conditions to that funding, like the Hyde
8 Amendment that I mentioned. Its Omnibus Appropriations Act has
9 pages and pages of grant conditions that are enacted by Congress
10 and signed by the President.

11 what's happened here is that without citing any
12 congressional authority, except as Your Honor noted, statutes
13 allowing the President to control their own employees, the
14 President has inserted his policy priorities onto that statutory
15 scheme.

16 The President -- that power has not been delegated by
17 Congress, so if it comes from anywhere it has to come from
18 Article II. And we know from *Youngstown* that Article II does
19 not give the President the power to make laws. And we know from
20 *Clinton versus New York* that it also doesn't give the President
21 power to alter or rescind laws by saying the President won't
22 spend money that Congress has authorized.

23 THE COURT: This seems a little closer to that
24 scenario, I would think. That it's almost a line item on the
25 funding, at least as you are arguing it.

1 I do have -- one point that no one, I don't think, and I
2 may have missed it, drew attention to the fact that Congress has
3 repeatedly attempted -- well, I shouldn't say Congress because
4 it didn't pass. But certain people in Congress have proposed a
5 number of Bills. I found HB10075, the Stopping Mutilation of
6 Children Act of 2024, did not pass. HB1276 Protecting Minors
7 from Medical Malpractice Act of 2023, this also did not pass.

8 The City and County of San Francisco versus Trump case from
9 the Ninth Circuit makes reference to the fact that Congress
10 frequently considered, and has thus far rejected, legislation
11 accomplishing the goals of the Executive Order in that case
12 which had to do with, quote/unquote, sanctuary cities.

13 But it seems like pretty strong evidence that the Executive
14 Order is attempting to do what Congress is supposed to do; that
15 Congress has tried to do it and has not yet succeeded.

16 MR. BLOCK: Your Honor, I think that's right. I would
17 just add one note of caution from one of my favorite cases,
18 Bostock, which does note that attempt -- the fact that prior
19 legislative proposals have not passed isn't evidence that
20 changes the meaning of the statute that has passed.

21 So I would just -- I think those two concepts are
22 compatible here, and that this is evidence that everyone
23 understood that this would primarily be the responsibility of
24 Congress. And, in fact, this is not an intervention that has
25 been passed through democratic means.

1 And I think that is one thing that fundamentally
2 distinguishes this case from cases like *Skrmetti* at the Supreme
3 Court. Where in those cases actual laws were passed by the
4 state legislature, you know, banning the provision of medical
5 care. And, of course, we believe that those laws are
6 unconstitutional, but the argument on the other side of those
7 cases was that you should defer to the democratic process. And
8 the court should, you know, step in to overrule what the
9 democratic process has decided.

10 And I think that this case is the opposite. The democratic
11 process has not decided to impose these restrictions. This is
12 the President imposing these restrictions in defiance of the
13 democratic process. If he wants to propose a Bill to Congress
14 and have Congress debate the Bill, then that's how the system of
15 separation of powers works. But there's no democratic
16 legitimacy to this unilateral Executive Order.

17 THE COURT: Now, this may be about the right time to
18 ask you about the -- there are many cases called *Albaugh*, but
19 the one that the Government cites to regarding the labor
20 contract provision, and that's a D.C. circuit case, obviously
21 not binding. But how do you distinguish *Albaugh*? There is an
22 Executive Order that essentially puts some strings on
23 congressional action. Now, obviously, I think in that case the
24 President was claiming authority under particular statutes to do
25 what the President did. But how do you distinguish that case?

1 MR. BLOCK: Well, Your Honor, I would say that in that
2 case the agencies were going to implement the order with the
3 normal administrative processes. And when people were affected
4 by the agency action they would have an opportunity to bring a
5 lawsuit to challenge it, to bring all of their appropriate
6 remedies to that.

7 That is not what happened here. And I think I would just
8 underline, we're not seeking a TRO against the entire Executive
9 Order. There are all sorts of unlawful directions in here. The
10 reason why there's a crisis right now is because this paragraph
11 of the order tells agencies to act immediately. And that
12 actually distinguishes that paragraph of the order from all
13 other provisions in the order.

14 You know, they want to change the conditions of
15 participation in Medicare and Medicaid, presumably there will be
16 the rulemaking process to attempt to do that, and then people
17 will file notice on rulemaking and follow the appropriate
18 procedures.

19 what happened here was that there has been a threat from
20 the administration and that they've carried out to withhold
21 funds without following the proper administrative procedures.
22 And for a hospital that's just a disastrous consequence. They
23 can't have their entire funding yanked temporarily. You know,
24 they need, you know, at least by -- the Government has been
25 pitting this vulnerable minority against the welfare of all the

1 other hospital patients in putting them to impossible choices.

2 THE COURT: Yeah. Because the order speaks in terms
3 of cutting off. They shall assess grant and grantee and ensure
4 funds do not promote gender ideology. But I think what you're
5 implying is there's an or else in there which is, or you lose
6 all of it because no one is going to parse out what's going to
7 what treatment and what's going to another?

8 MR. BLOCK: Well, actually, I think it's more than
9 that. Because it says -- you might be quoting from the HRSA
10 email.

11 THE COURT: Well, I was quoting from section G of the
12 Defending Women from Gender Ideology. It says, Ensure grant
13 funds do not promote gender ideology. And then we go to section
14 4 that describes as, Ensure the institution's receiving federal
15 research and education grants and the practice.

16 It seems like the Government may say well, we're just
17 trying to sort of carve out this particular procedure. And that
18 may not be. I mean, I think your argument would be well,
19 Congress has to do that.

20 MR. BLOCK: Right.

21 THE COURT: But I think what's implicit in these
22 orders, and the way that the hospitals are at least receiving
23 them is, we're going to lose everything if we don't stop doing
24 this one care.

25 MR. BLOCK: And, Your Honor, I do think that the first

1 order says you can't fund gender ideology, whatever that is.
2 But I do think the plain text of the second order says that if
3 you are a hospital receiving federal funds you cannot provide
4 this medical care. And I think that reading is supported by the
5 fact that that same order -- I mentioned the conditions of
6 participation in Medicaid and Medicare. Those are the rules
7 that a hospital has to follow in order to participate in the
8 Medicare program.

9 Saying that they want to change the conditions of
10 participation means they want to change Medicare to say that if
11 you are a hospital that provides gender-affirming surgery, you
12 are not allowed to be in the Medicare program at all.

13 So I do think that someone reading the text of this order,
14 reading the other actions the order's directing, I think very,
15 you know, reasonably could understand this as saying that we're
16 going to hold all your funding hostage if you provide -- even if
17 you provide surgery to people fully with private funds, without
18 a federal penny because President Trump doesn't want to
19 cross-subsidize it.

20 THE COURT: And, I mean, you're agreeing that there
21 are portions of this order that are lawful. Like, for example,
22 instructing -- I was looking at it this morning and trying to
23 pick out some things that I thought wouldn't be problematic.
24 Like, for example, telling the assistant for Legislative Affairs
25 to propose bills that codify some of the President's objectives.

1 You'd agree that's entirely appropriate. Maybe not.

2 Appropriate may not be the word because you don't agree with the
3 substance of it, but that that would be constitutional.

4 MR. BLOCK: If we're talking about proposing bills to
5 Congress, yes, I don't see a constitutional problem.

6 THE COURT: And there's other provisions in these
7 orders that ask, you know, or demand the removal of certain
8 reading material or pamphlets or ways that the Government goes
9 about managing its own employees. They may -- those directives
10 may run afoul, in your view, of other laws and -- but at least
11 as it pertains to your Separation of Power argument, you'd agree
12 those are okay, too, at least under that, that standard.

13 MR. BLOCK: Especially the Separation of Power
14 argument at issue in this TRO, yes. I think that, for example,
15 you know, the Government taking down CDC websites as ordered by
16 the Executive. You know, there has been an EPA claim in another
17 case brought against that, talking about it being arbitrary and
18 capricious. So I don't want to say that any of the other
19 provisions, you know, would be, you know, constitutional,
20 especially if they're motivated by animus. But I don't see --
21 we don't need a TRO on them.

22 THE COURT: I have some animus questions but I think
23 they'll go to you because there's -- at the core of these orders
24 I'm sort of interested in what is really being said here.

25 All right. So you've -- we're talking about Albaugh,

1 distinguishing Albaugh. Are there any other cases that you
2 think are sort of on-point for you other than Youngstown and the
3 sort of original ones?

4 MR. BLOCK: Youngstown and Chadha and --

5 THE COURT: Uh-huh.

6 MR. BLOCK: -- of New York. But I think the HIAS case
7 from the Fourth Circuit. The, you know, San Francisco case that
8 the HIAS case cites.

9 And then I do think, as we noted, you know, in our reply,
10 that to the extent that they are -- want the agencies to do
11 something that conflicts with section 5054 of the Affordable
12 Care Act, which prohibits HHS from interfering with the
13 provisions of medical care, I do think that's also evidence of
14 Congress's purpose in how an Executive Order like this conflicts
15 with that.

16 THE COURT: Yeah. On HIAS -- now HIAS is binding.
17 And HIAS -- I mean, to the extent that it's very specific. But
18 that was talking about an Executive Order that sort of upended
19 the refugee resettlement, if I remember correctly, and
20 essentially took it from a system where the Executive had final
21 say to one where either states or localities or both, I can't
22 remember, but they had sort of veto power.

23 And I noticed in that, the Fourth Circuit didn't seem to be
24 troubled at all that there are clocks on the imposition of some
25 of those conditions such that they hadn't happened yet. And

1 that didn't seem to take up any of the space of the opinion;
2 they just plowed right ahead and dealt with it.

3 I'm going to ask the Government the same thing. Is that
4 just an oversight or does that speak to what we have here?

5 MR. BLOCK: I think it speaks to what we have here.
6 And I think the Iraq versus Trump cases are another example of
7 that. Where I think that, you know, when an order just facially
8 conflicts with the statutes that Congress has passed, I don't
9 think that you need to await specific enforcement for a
10 re-enforcement challenge to be ripe. And I think that's
11 especially true here.

12 where I think what makes these orders so pernicious is the
13 terrorizing effect they have on hospitals. And that as a result
14 of those terrorizing effects it's our clients, the third
15 parties, that are being harmed by holding a gun to the
16 hospital's head.

17 There is a case I wanted to make sure to explain in detail
18 on this, the causation issue, which is the Department of
19 Commerce case, you know, which we cite in our brief. It talks
20 about how actions that result from the predictable effect of
21 Government action on third parties, you know, satisfied
22 traceability and redressability.

23 But another important part of that case is, you know, what
24 happened was the undocumented immigrants were concerned that if
25 they answer a citizenship question they would be targeted by

1 ICE. And the government's response in that case was, there are
2 privacy laws prohibiting the government from doing that.

3 So the government's argument was that this fear of the
4 undocumented immigrants was legally incorrect because there was
5 a statute prohibiting that action. And the Supreme Court still
6 said that it didn't matter whether that was actually authorized,
7 what mattered is that studies had shown that there was a fear
8 that that would happen. And all you needed was de facto
9 causation.

10 So, you know, it doesn't really matter in terms of showing
11 this is ripe and redressable. You know, whether or not there's
12 a boilerplate, you know, sentence in the order. What matters is
13 that the predictable and intended effects of the order was to
14 prompt immediate compliance. And I don't think you have any
15 better proof of that than the President's press release saying
16 this is the intended --

17 THE COURT: Well, it also strikes me -- it leads --
18 and I'll ask the Government again -- you're hearing that a lot.
19 But the -- there could be a scenario where no one's funding is
20 ever cut because they choose to stop providing the care. So you
21 would never have the funding cut to initiate the litigation
22 because everyone just fell in-line. Which, to me, raises the
23 issue of well, when could you. When could you challenge this.

24 I will say it seems -- again, the record is rapidly
25 developing, obviously, but are there some hospitals that receive

1 federal funds that are continuing to provide gender-affirming
2 care to people under the age of 19?

3 MR. BLOCK: Yes, Your Honor.

4 THE COURT: Okay.

5 MR. BLOCK: And I think that, you know, the fact that,
6 you know, some hospitals have, you know, given into the threat
7 and other hospitals have so far not done so, I don't think
8 changes the fact that the threat is what caused the care to stop
9 at those particular hospitals.

10 THE COURT: Okay. All right. Well, on that point,
11 let me check and see if I have any more questions for you. None
12 at this time. I'll go ahead and --

13 MR. BLOCK: Should I -- sorry. Should I address the
14 Scope of Relief now or wait?

15 THE COURT: Maybe we'll do that later.

16 MR. BLOCK: Sure thing.

17 THE COURT: If I forget, I don't think I will, but if
18 I do just raise your hand.

19 MR. BLOCK: I will. Thank you, Your Honor.

20 THE COURT: Thank you.

21 Mr. Graver, come on up. And take your time to get settled.

22 MR. GRAVER: I appreciate it. I tried to write down
23 various questions you flagged.

24 THE COURT: There's a lot. I may ask them again.

25 MR. GRAVER: That would be very helpful.

1 If I may, just at the start, what I want to provide to you
2 is level-set a little bit about what the orders are at issue. I
3 think the way in which my friend is portraying it is that it is
4 an overnight, nationwide ban on certain medical procedures.
5 That is not the case. It's not a nationwide ban; it is not a
6 categorical funding freeze. It is very easy to write an
7 Executive Order that looks like that.

8 This Executive Order is a general policy directive that
9 charges executive agencies, implementing a goal from the
10 President consistent with law. And I understand, even putting
11 aside the consistent with law piece, I think the key text of the
12 order is not stop everything right now, overnight, so long as
13 it's cool with the law. Instead, look at the exact command that
14 runs towards the agencies.

15 THE COURT: But it says immediately take appropriate
16 steps.

17 MR. GRAVER: The appropriate steps is the key piece of
18 this.

19 THE COURT: Not immediately?

20 MR. GRAVER: Well, its immediately start to explore
21 this policy situation. Let me give a parallel, sort of the way
22 in which I'm starting to think about it. People are
23 paraphrasing a little bit from some things that's issued, I
24 think, from the last administration.

25 Imagine President Biden says I would like federal grants to

1 be awarded consistent with goals of racial justice and on the
2 basis of race consistent with the law. Now, executive agencies,
3 please go out and do that. There is a lot of legal work for
4 those executive agencies to do, especially after the Supreme
5 Court's decision in Harvard.

6 And what the Executive Order says is not blow past all of
7 that, not that get rid of grants or award grants at all costs,
8 but this is my general policy. This is what I would like to
9 accomplish at a big picture level. Now go out, collect facts,
10 and develop that policy on the ground on a case by case basis.
11 I think that's --

12 THE COURT: I don't know that -- I mean, it's a
13 hypothetical so maybe I missed a part of it. I'm not
14 disagreeing with you that that would be lawful because you're
15 essentially telling your agencies to follow the law. The issue
16 here, is it seems clear, is that these orders say federal funds
17 cannot promote gender ideology and that OMB must immediately
18 take steps to ensure that institutions receiving federal
19 research or education grants and the chemical and surgical
20 mutilation of children.

21 You've got to do a little bit of juggling, but when you get
22 to the definitions it's clear this means gender-affirming care.
23 And it's clear that the hospitals at least are taking this to
24 mean something. which I can see the debate there except for the
25 email.

1 MR. GRAVER: Right.

2 THE COURT: The email from HRSA and the CDC saying
3 stop it. I don't know how anyone can credibly argue that this
4 is not an immediate command to cease providing that care. It
5 seems -- and it's a strong word, but seems almost disingenuous
6 to argue otherwise. It's just ignoring the reality of what's
7 happened with this order. And add to that the press release
8 saying -- and it -- I think it's a quote, "These orders have had
9 the intended effect. Look at all the care that's been stopped."

10 Again, I'm not taking a position on the issue at all, I'm
11 just saying it's hard not to view all that and say that these
12 orders were intended to immediately stop that care. And that
13 that -- and more importantly, these orders were intended to
14 immediately stop federal funding and that's Congress's job.

15 MR. GRAVER: Uh-huh. So two points. One more
16 threshold and the other more fundamental.

17 The threshold point, I just want to make a flag for maybe
18 the Scope of Relief point. As I understand my friend's TRO,
19 especially if it runs towards protecting any EO, those relate to
20 grant programs that have nothing to do with medicine. You're in
21 context where it's about the Government choosing what messages
22 or initiatives itself wants to subsidize. So I just want to put
23 that on the side for a moment. The TRO, which is a categorical
24 facial challenge to those two provisions in any application,
25 reaches well beyond the context of medical procedures and

1 medical treatment. So I just want to flag that at the start.

2 THE COURT: I mean, I hear that but I'm -- how so?
3 Because right now it seems the only -- the only area that they
4 appear to be reaching is gender-affirming care for minors.

5 MR. GRAVER: So I --

6 THE COURT: Those provisions. Like I said, there's
7 some other provisions that they're not even challenging, and
8 rightfully so because they're totally within the presence of --

9 MR. GRAVER: Right. Can I jump over and grab the
10 order quick?

11 THE COURT: You can walk.

12 MR. GRAVER: So -- and again, I want to get to the
13 more fundamental point, that I'm just flagging this for now. Is
14 that at least as I understand for the proposed order and the
15 TRO, it bars any implementing, enforcing, applying the directive
16 in section 3(g) of the Defending Women EO. That federal funds
17 shall not be used to promote gender ideology and then directing
18 grant conditions.

19 The only point I'm making at the jump is that that
20 stretches well, well, well beyond anything of medical space.
21 And I agree that my friend's have focused exclusively on that.
22 The issue there, for this Court, is that they're pressing a
23 categorical facial challenge which reaches well beyond other
24 members who are affected and the legal theories they press. But
25 I want to get to the more fundamental --

1 THE COURT: But we could tailor -- I could tailor an
2 order to address your concerns, right?

3 MR. GRAVER: I don't want to jump ahead too much, but
4 I don't think so.

5 THE COURT: Okay.

6 MR. GRAVER: For party presentation reasons and very
7 fundamental reasons about facial relief, but I'm just gonna --

8 THE COURT: No, that's fair.

9 MR. GRAVER: -- ignore all of that for a moment.

10 THE COURT: We'll talk about that later.

11 MR. GRAVER: So I think that the force of my friend's
12 argument is essentially, as I understand, like that the EO may
13 well be able to accomplish its ends without actually ever doing
14 anything and evading judicial review, and I understand the
15 concern. The issue, I think -- the problem with the nature of
16 the challenge that they're pressing is not the fact that the EO
17 has had real-world effects, it is necessary but certainly not
18 sufficient condition.

19 You can imagine a circumstance; governmental officials all
20 the time have the ability to change events in the real world
21 without there being any formal action. Imagine if President
22 Trump announced this policy in a speech. Was able to move
23 markets, able to check things on the ground, able to change
24 regulated entities. That wouldn't necessarily be the stuff of
25 judicial review.

1 The key point here that I want to make is not that they're
2 not real-world effects happening on the ground, it is that this
3 across the board categorical facial challenge is not the right
4 way to address them. And the defect with it is that their
5 arguments are too abstract. It isn't concretized into actual
6 grant programs where we know the terms and conditions of the
7 grant or the federal laws that actually apply, or even the
8 direction that's running towards the agencies.

9 THE COURT: But that's because the order did. They
10 said all funding. Don't couch -- and I think your response
11 would be, well, that's the point, we have to take time to figure
12 out what funding streams we're talking about and all that.

13 MR. GRAVER: So, Your Honor, this is how we read -- I
14 read the order at least. If you combine my reading of the order
15 and you spot my friend's that they are 100 percent correct on
16 every jot and tittle of the law, what an agency should then go
17 back and go to President Trump and say there's nothing we can
18 do. There's no directive in here that says blow past federal
19 laws no matter what they say, no matter what.

20 And again, the key piece is not, I guess, what you guys are
21 calling the boilerplate stuff at the end. It is very easy to
22 issue a funding freeze that is nondiscretionary, that is --
23 removes the idea --

24 THE COURT: No, I agree that it is and it could
25 perhaps be clearer. I'm just really struggling because it says

1 immediately, and then these emails and -- or email and notice
2 went out. I don't know --

3 MR. GRAVER: Let me offer two points with this. It's
4 immediately to take appropriate steps. Putting that to the
5 side.

6 THE COURT: So they said alright, the appropriate
7 steps is an email to every grant recipient, every funding
8 recipient; stop. Stop this.

9 MR. GRAVER: So here's the key point of it. Is that
10 even to the extent the email was not rescinded, which my
11 understanding at least as --

12 THE COURT: Yeah. The idea of rescinding the email --
13 I would love to rescind a lot of texts and emails, if I could
14 just say it. I don't know how that works absent like a more
15 pronounced, by the way, when we directed you to stop promoting
16 gender ideology we did not mean stop providing gender-affirming
17 care. We're studying avenues for that. That I can completely
18 understand. And if at that point a grant recipient says we're
19 just going to stop because we see the writing on the wall or
20 something in the future, I could totally understand your
21 position there, but that's not what happened.

22 MR. GRAVER: Right. So I think my objection is not to
23 that intuition, but it's to shoehorning it into this case. What
24 would be the proper way, as I understand it, to challenge an
25 Executive Order like this is not to offer the facial relief that

1 they proposed, but it's in instances. And again, even before
2 funding is actually cut, what my friend was talking about is the
3 fodder of a pre-enforcement challenge. And we're not taking any
4 issues with pre-enforcement challenges. But the virtue of the
5 pre-enforcement challenge, the way you're describing recipients
6 of that email is that we actually have facts and law to apply.

7 In those circumstances we know the federal scheme at issue.
8 We know the relevant federal laws at play. We know the terms
9 and conditions of the grant because of having that circumstance.
10 Is the grant recipient saying well, I'm being put up to this
11 impossible choice. They're saber-rattling over here, I read the
12 EO like this, what am I to do. That is the exact circumstances
13 that private parties all the time seek pre-enforcement relief
14 on. The issue here is the scattershot.

15 THE COURT: Yeah.

16 MR. GRAVER: It is not the idea --

17 THE COURT: It just seems difficult. Because I'm
18 pretty bad with analogies, but I'm thinking if there's smoke
19 coming out your house, you don't know the room, you don't know
20 exactly where. You don't wait to call 911 until you know the
21 exact location of the fire.

22 I think in this situation it is clear that these Plaintiffs
23 have received phone calls stopping their care; stopping their
24 appointments, stopping their everything. And it's because
25 the hospitals have been told you've got to stop doing this.

1 I don't know. What would it look like -- what would
2 literally the nuts and bolts of a claim that you think, in your
3 view, would be appropriate under these circumstances? When
4 could they file a case?

5 MR. GRAVER: Right. So I think, Your Honor, it would
6 be very similar to what you see all the time from regulated
7 entities that receive guidance documents in the private sector.
8 And there's always a fight about sufficient ripeness and
9 whatever it is. But like that is -- the key part to that, I
10 think, is that it confines a dispute to an actual case or
11 controversy.

12 The issue here -- and I just want to take one step back.
13 Is that it is not -- the question before this Court is not that
14 are there instances in the EOs affects in the real world that
15 confine to a case where a controversy may or may not be lawful.
16 And even if Your Honor thinks there might be instances, right
17 now where the parties are saying bring suits and stop the EO
18 from applying to them, that is not the issue currently before
19 this court.

20 The issue -- because my friends are pressing, again, a
21 facial challenge, which biased terms means no application of
22 this Executive Order can be lawful. You need to --

23 THE COURT: Well, those provisions. And they're
24 saying those provisions can't be lawful because they are taking
25 -- essentially the President is taking Congress's place in

1 directing how funds are to be spent when Congress didn't make
2 those directions. That is the gist of at least the separation
3 of Powers claims as far as I can tell.

4 MR. GRAVER: It's the gist of the Separation of Powers
5 claim, but I think even as your question reveals it's awfully
6 abstract.

7 THE COURT: I don't think it's very abstract. It
8 doesn't seem that abstract, and here's why. Because what I'm
9 hearing you say is we should wait for the rulemaking --

10 MR. GRAVER: No.

11 THE COURT: -- and for the -- okay, no. All right.
12 well, we should wait for some more guidance on exactly how
13 the President wishes to enact his policy goals that are set
14 forth in both of these, which I would totally be receptive to
15 except nobody waited to send the email and send the notice. So
16 you can't necessarily -- you might get the benefit of the time
17 to develop all those things, and to allow the attack, if you
18 will, to be a little bit more surgical if you send the email and
19 send the notice that essentially nukes the entire nationwide
20 funding or threatens to take away funding everywhere if you
21 provide this care. It's almost like you don't get the benefit
22 of what you're talking about if you go about it in the way that
23 the order writes it and then that happened.

24 I guess the question would be if the email hadn't gone
25 out -- or rather this. If the email hadn't been rescinded do

1 you think they would have the ability to be here where they are
2 today?

3 MR. GRAVER: I don't think these Plaintiff would have
4 that ability on the challenge they're pressing here. Because
5 again, even with those emails themselves, we're dealing with a
6 subset of the conceivable grants here. So, for instance, there
7 are very different legal regimes that come with, let's say,
8 grants and medical institutions that are performing medical
9 procedures, which is the focus of the briefing.

10 AS I understand it at a high level, different rules of the
11 road apply. For instance, when you refer to subsidizing, say,
12 research, there's not a sort of discriminatory dynamic there,
13 that's about what the government wants to throw its own money
14 behind.

15 Then there's circumstances too, again, the EO stretches
16 well beyond the medical space. But even in the medical space,
17 for in other examples that there are certain facilities that say
18 new grants that would go to an institution that's only
19 performing gender-affirming care. That might not be something
20 the administration wants to do anymore. That is -- the reason I
21 keep coming back to a facial challenge is that the broad brush
22 here sweeps all of that in.

23 The examples that you're giving, and I understand the focus
24 for it because of the real world effects. So when you have
25 actual medical institutions and you can get -- we're narrowing

1 the universe into an actual concrete dispute that's justiciable.
2 You have medical institutions worried about a particular type of
3 grant who, as my friend was saying, the standard for
4 pre-enforcement challenge that he was mentioning, and this would
5 be the standards. Do they fear a credible threat enforcement.
6 At which point they can go into court and we know the applicable
7 law, we know the applicable grant, we know the terms.

8 All I'm saying here is that the EOs direct agencies over
9 federal grants as a whole which involve enumerable fact patterns
10 in very different legal regimes. My objection to the facial
11 relief here is that this is knocking it all down in one fell
12 swoop before anything is meaningfully implemented in a whole
13 host of spaces.

14 THE COURT: But, again, then that's where I keep
15 coming back to. But that's the fault of the senders of the
16 email and the senders of the notice. Because that notice
17 doesn't provide any granularity, it just says stop it or you
18 lose your funding. It doesn't identify streams, it doesn't
19 identify specific programs, it just speaks in general terms. So
20 I don't know what we're supposed to do here.

21 MR. GRAVER: Well, certainly, I think the CDC email --
22 or the email from your regulator -- again, trying to confine the
23 universe here. The people who are affected by an email from a
24 regulator are the regulated. If I'm not regulated by CDC I
25 don't care too much about what CDC is saying. I think that's

1 the key point here. Is that even on these rescinded emails,
2 even on these rescinded emails they deal with a subsetting,
3 subset of how the EOs might be applied. So that is the key
4 piece of this.

5 And again, if providers who are affected by those grants
6 want to come forward and bring a pre-enforcement challenge, that
7 is a fundamentally different dynamic.

8 THE COURT: If the providers of the grants or the
9 recipients?

10 MR. GRAVER: I'm sorry, the recipients. I meant the
11 medical providers.

12 THE COURT: Okay. So that goes back to this question
13 of this intermediary issue which did jump out at me when I read
14 the complaint, which is a there is a step here. But then I was
15 looking into some cases, and there's the one out of the Ninth
16 Circuit, the King County case.

17 MR. GRAVER: Okay.

18 THE COURT: You know the one I'm talking about, where
19 they directed that you couldn't have flights -- King County
20 passed an ordinance or something, some directive that said
21 essentially ICE can't fly out of our airport.

22 MR. GRAVER: I'm vaguely familiar with it, yeah.

23 THE COURT: And the issue was -- it was the airport
24 that was saying, okay, you can't fly here. But at the end of
25 the day the Ninth Circuit simply said, you know, it's clear, the

1 writing's on the wall, the government is behind this. The
2 government in King County in that instance.

3 And here it seems the same, where the message is clear; you
4 can't provide this care or you're going to lose your funding,
5 and so the agencies go along with it.

6 But like I said to the Plaintiff, what about the scenario
7 where no one, they just cut off all the care, no one loses
8 funding, how do you challenge it then?

9 MR. GRAVER: Again, I think the -- there's a few key
10 pieces of it. The first is I just -- I do want to emphasize
11 that I think to underscore the immediacy of this everyone keeps
12 changing what the order actually says. It is not as direct as
13 Your Honor portrayed, and I think that's intentional.

14 THE COURT: I'm using the words of the order. It says
15 immediately. I understand there is language that you are
16 pointing to. I mean, we know about the follow the law. There's
17 also references to working in coordination with the director of
18 OMB. But it does use the word immediately to take steps, and it
19 seems like those steps were taken.

20 And then the section G of the other order, and I'm speaking
21 specifically of the Defending Women order, just says Federal
22 funds shall not be used to promote gender ideology. And it does
23 say that each agency shall assess grant conditions and grantee
24 preferences and ensure grant funds do not promote gender
25 ideology. But again, I'm not seeing much of a clock on that

1 either. That seems rather immediate. This language seems
2 immediate to me.

3 MR. GRAVER: So I don't disagree that it's immediate,
4 but the question is immediate as to what. You can imagine an EO
5 that is much more direct, only that it's been kind of --
6 paraphrase this, immediately cut off funding, and ten paragraphs
7 later, by the way, so long as it's consistent with law.

8 THE COURT: That would be flatly illegal, right?

9 MR. GRAVER: I think that across the board blanket any
10 grants no matter what, blah, blah, blah, would face a very
11 different legal standard. The only reason I -- there are
12 enumerable grant programs; you see the terms and conditions, you
13 see what they are. But I think an across the board thing, and
14 what my friend is describing too, is identifying a couple of fed
15 statutes that impose certain conditions and then measure it
16 against the backdrop of a hypothetical EO that tells agencies to
17 blow right through them no matter what. Yeah, that's a legal
18 problem.

19 THE COURT: Or you can see an EO that says the
20 President's authority is vested in this section. You see these
21 a lot in the labor world, obviously. A ton of these cases come
22 out in the labor world because the President often enacts
23 Executive Orders that he believes are rooted in some aspect of
24 the statute that gives, and then you find out whether or not
25 that's actually true.

1 Here, the only authority that the President cites to in the
2 Executive Orders is the Constitution, and then the provision
3 that allows the Executive to sort of police executive employees,
4 and this goes beyond that. So what do we do there?

5 MR. GRAVER: So, but --

6 THE COURT: Again, no specificity so --

7 MR. GRAVER: But that makes perfect sense in light of
8 the way that I'm reading the order.

9 THE COURT: Uh-huh.

10 MR. GRAVER: So again, I want to go back. It's the
11 same thing as sort of like the racial justice grants, which I
12 realize this is kind of a -- this is different federal grants.
13 There's a million different policies, there's a million
14 different grants, there's all these overlapping laws. Here's
15 what I would like to do. Here's the X that I would like you to
16 work for. Agencies, go out, gather facts, assess the law,
17 figure out how you might be able to implement this.

18 I think that is fundamentally what the circumstance is
19 here. It is not sort -- I guess the part -- the reason the
20 Article II makes all the sense in the world as sort of the only
21 thing you need to cite is because the President is charging the
22 Executive branch with exploring a policy goal. That is what the
23 intent is, as I understand it, within its four corners.

24 And again, I just -- especially as you compare it to maybe
25 sort of other freezes or other X statutes, or other -- there's

1 ways in which you can write this more directly. I do not want
2 to --

3 THE COURT: And less directly.

4 MR. GRAVER: And less directly.

5 But an order that says take appropriate -- that identifies
6 a policy goal, says take appropriate steps towards it consistent
7 with the law. It simply cannot be unlawful for the President to
8 tell the Executive branch, I want you to do X, consistent with
9 applicable law, and come back to me with solutions. And
10 that's --

11 THE COURT: I don't think I disagree with you. I feel
12 like in some ways we're both looking at the Mona Lisa and trying
13 to decide whether it's smiling or frowning or --

14 MR. GRAVER: Sure.

15 THE COURT: I'm just reading it differently at this
16 point, but I'm not disagreeing with your overall point. Which
17 is if it said things the way you said them, like the proposed --
18 I don't know if that order you were referencing about racial
19 justice is a real one or it's a hypothetical. But something
20 like that, sort of a vague pronouncement of a change in policy
21 or a desire to effectuate a certain policy, instructing agencies
22 to go out and look at ways to do this. But I just think that
23 absolutely ignores the reality of why we're here today.

24 MR. GRAVER: Yes. Your Honor, take -- tweak then the
25 hypothetical. Imagine an order that says I would like grants to

1 immediately be awarded consistent with goals of racial justice
2 consistent with applicable law.

3 THE COURT: But that's not what this says. This says
4 immediately funds. It uses the word funds. It doesn't say
5 explore the manner in which we can effectively promote our views
6 on gender ideology, it just says cut funds.

7 we've been going back and forth on this. The question that
8 I have is with -- what I asked about the HIAS case, which is a
9 Fourth Circuit case. Again, clocks are on that, no discussion.
10 I think one of the things I said I would ask you about is why
11 doesn't HIAS stand for the proposition that we can dive right in
12 and discuss this even though there's no what and when and how
13 something is going to be implemented.

14 MR. GRAVER: Right. I think that my answer to HIAS is
15 going to run into what we've been talking about before. And
16 that, again, the key point -- and I don't mean to harp on it but
17 it I think it relates back to HIAS -- is that it is very hard --
18 at least as I read the term appropriate steps; appropriate steps
19 consistent with law of, you know, all holds barred approach to a
20 policy goal regardless of the cost. I think that's very hard to
21 read that in the appropriate steps. And I think that relates
22 back to HIAS. Because I think HIAS in all are perfectly
23 consistent. And what they reflect, essentially, is that there's
24 sort of a spectrum before federal courts can jump in to
25 reviewability.

1 On one end of the spectrum you have an instance where the
2 President has a broad policy directive, where agencies then put
3 meat on the bone; they collect facts, they assess appropriate
4 law, they then develop policies. What you have in HIAS, and you
5 have in some of these cases, is when have you a discrete
6 governmental action that's contained within the four corners of
7 the order, such that it is sufficiently concrete and ready for
8 judicial review, that's, I think, the circumstance that HIAS
9 applies to.

10 What I was explaining before, essentially, of like, you can
11 imagine a million different applications of these EOs, I don't
12 think anyone here is now contending that even on these --

13 THE COURT: I don't have -- again, I don't have to
14 imagine anything because we have emails, we have directives, and
15 we have hospitals all around the country responding to it. And
16 I suppose you could argue, well, that's them. That's on them,
17 they're making that decision. And you are, in fact, arguing
18 that.

19 MR. GRAVER: Correct.

20 THE COURT: But HIAS actually specifically -- I had
21 some of the text of it here. It says, and I quote, "The intent
22 of the order is clear," when they're talking about the order.
23 So they're actually getting into the intent. And again, that
24 order was one that even though it hadn't been implemented yet
25 was gonna turn upside down what -- I believe it was a statute.

1 And it essentially green lighted what I would view as sort of
2 the common sense review of what was happening in response to
3 that order.

4 So I don't -- and, of course, City and County's the same
5 way; City and County of San Francisco case. Again, Ninth
6 Circuit but same thing. A little bit more on the savings clause
7 or -- but same general idea, which is we don't wait around as
8 long as it sounds like the Government's asking if the intent of
9 the order is clear, the issues are fresh and easy to determine.
10 And in this instance -- I'm not even sure in that instance there
11 was necessarily the same harm, but just sort of standard, just
12 civility questions. And we have that here. We have a clear-cut
13 issue and we have Plaintiffs who are suffering because of it.
14 Now, again, how we decide this is a totally different question,
15 but just on the justiciability side it seems like a stretch.

16 MR. GRAVER: I think the last point, and I don't want
17 to beat a dead horse with this. Even in the circumstances that
18 you're going with, suppose that, you know, you disagree with the
19 lion share for us saying with respect to the agencies that had
20 issued those emails. That is a fraction of the agencies and
21 applications of the two provisions at issue. And I just -- what
22 I don't want to lose sight of is the nature of the challenge
23 that my friends have decided to put before the Court.

24 You can have an as applied challenge targeted towards those
25 agencies, who by the way are not the President, not the

1 Executive Order. In that instance you're dealing with the
2 implementation of the Executive Order which is a much more
3 conventional way in which these things are reviewed.

4 The key point here, is I think that there is this shifting
5 a little bit to inverting the burden. Where all I need to do to
6 strike this thing down in full, or enjoin it in full is to
7 identify one instance, or a handful of instances, where I think
8 it might be unlawful. But that is the opposite of the actual
9 question before the Court.

10 In order to obtain the relief that my friends are seeking
11 the question is, is there a single application of this law,
12 conceivable application of this law that is lawful. And when an
13 order directs agencies to take appropriate steps consistent with
14 law, even -- the easiest example of that is what all the other
15 agencies are doing.

16 Let's assume -- let's put aside the two agencies that sent
17 the now rescinded emails. Everyone else is doing what I see in
18 this to be the command of the EO.

19 THE COURT: Who is everyone else?

20 MR. GRAVER: I don't know the full -- I mean, this is
21 a part two.

22 THE COURT: Well, give me an example.

23 MR. GRAVER: I think -- I mean, there's -- for the
24 Protecting Women EO that applies to every executive agency in
25 the Government that develops a grant. So Department of

1 Transportation, Department of Education.

2 THE COURT: Well, does the Department of
3 Transportation fund gender-affirming care?

4 MR. GRAVER: Your Honor, look at the order.

5 THE COURT: I'm serious. I don't know how you can
6 credibly argue that this is somehow not commanding the cessation
7 of funding for these treatments. I'm just -- I'm struggling
8 with that. And I'm actually not struggling anymore. I don't
9 know how you can do it. And you're doing a great job because
10 you are seizing on the language, and I understand that. There
11 are some qualifying terms here. But I think we ought to just
12 move on to something else, because you've made your point and
13 I'll consider it. But I just don't know how that plus the
14 aftermath --

15 MR. GRAVER: The piece I'll flag, and I think this
16 might be coming, you know, in reading the room a little, is that
17 that is not the order that is before this Court. It reaches
18 well past the medical phase; it reaches across different sorts
19 of grants. So even to the extent that that circumstance that
20 Your Honor is pressing, you know, you've kind of settled on
21 that.

22 THE COURT: I think I see your point. And again --

23 MR. GRAVER: The scope of relief here, I think is a
24 very meaningful point, and it's not something that I think --

25 THE COURT: So you're saying, for example, in the

1 Defending women from Gender Ideology Order, section G, federal
2 funds shall not be used to promote gender ideology. Each agency
3 shall assess grant conditions and grantee preferences and ensure
4 grant funds do not promote gender ideology.

5 So the Government, the National Endowment for the
6 Humanities had sponsored an exhibition of trans artists in Los
7 Angeles that was set to open next month. You're saying that
8 their relief would make it such that the government couldn't
9 stop that funding even though it would have a legal right,
10 potentially, to do so?

11 MR. GRAVER: Correct. I mean, I've put it back over
12 there at this point. But as I understand the order, the
13 proposed order is any implementation.

14 THE COURT: Of section G and section 4.

15 MR. GRAVER: Correct. Which applies well beyond the
16 medical case. None of that has been briefed.

17 And in general, too, if the government has a much freer
18 hand as to what messages or initiatives it wants to subsidize,
19 throw its own money behind, versus even in these circumstances
20 you're dealing with existing grants and all the minutia and
21 medical space. All I mean to say is that I think the scope of
22 relief point is a very important one that we -- you know, space
23 limitations and the like is not a huge piece of the briefing.

24 THE COURT: Yeah, I didn't flag it as a particularly
25 large issue. But anyway. All right.

1 Albaugh, you like, I assume. You talked about it a little
2 bit. But we were -- I talked about it with them. If you want
3 to respond to Albaugh and how it applies here.

4 MR. GRAVER: Yeah. I think the point is that HIAS and
5 Albaugh, and the Ninth Circuit case that you mentioned all are
6 consistent. And it was kind of the main point I was trying to
7 make before about -- I think there's spectrum of EOs. On one
8 hand you have a discrete command, discrete policy command that
9 you can assess. And there, if you look at HIAS and you ask the
10 court did they overlook anything. No. And there you had -- you
11 knew exactly the policy at issue.

12 You had the part of the INA. You can see exactly what
13 they're commanded to do, there's very little discretion. That's
14 a convertized dispute. You know, the theme that we're kind of,
15 I think, pushing here is that a facial challenge here is too
16 abstract. Even if you can conceive of confrontile
17 circumstances, a facial challenge is too abstract.

18 In Albaugh, I think we had a little bit more, something a
19 lot closer here. Is where the President said like -- I think
20 there's a lot of EOs that fall in the category Albaugh is in,
21 which is like I would really like to do X. The federal
22 government is massive, the federal laws are overlapping. Let me
23 kick it to the agencies, the expert agencies which are supposed
24 to be the ones that handle this; do what you can about X
25 consistent with the law.

1 I think what Chief Judge Ginsberg recognized there is that
2 in those circumstances that is a core Article II prerogative.
3 Essentially it's the research and development of a policy versus
4 a discrete command.

5 THE COURT: Yeah. But these are all pre-Loper Bright.
6 I was thinking about the -- I mean now courts are being told
7 that it's the court's job not the agency necessarily. There's
8 no more deference to the agencies. It would seem to strengthen
9 the Plaintiffs argument that, again it's, up to the court to
10 determine, you know, what this means over --

11 MR. GRAVER: So I think that when you have an agency
12 action before you, and the government is saying hey, if you do
13 X, Y, and Z under this statute, but Loper Bright says you don't
14 give them the benefit of the doubt. But I don't think that
15 necessarily cashes out to something like this. Because, again,
16 the whole point of the EO, I think like this is the way that I
17 read it, is essentially you just have a goal in mind and you
18 kick it to the subordinates in the executive branch to flush
19 that out. That is our fundamental reading of it.

20 THE COURT: I understand. All right.

21 MR. GRAVER: Yeah.

22 THE COURT: Well, do you want to talk about the equal
23 protection aspects? Do you want to break there?

24 MR. GRAVER: Should we switch?

25 THE COURT: Yeah, probably. And then we'll -- and

1 then I intend to take a break and come back and potentially rule
2 from the bench. I should have said that at the outset. My
3 intention is rule from the bench and then provide some written
4 opinion to follow.

5 But the floor's yours.

6 MR. GONZALEZ-PAGAN: Thank you, Your Honor.

7 Your Honor, I'm going to start with the section 1557
8 argument specifically. And I want to start because counsel on
9 the other side has spoken about the EO exploring applications
10 that would lead to this particular goal.

11 Ultimately, section 1557 is very explicit in that any
12 health program or activity that receives any type of federal
13 financial assistance, doesn't matter the funding stream, doesn't
14 matter what grant it is, doesn't matter the nature of the grant,
15 cannot discriminate on the basis of sex. There is just no
16 universe for the agencies here to explore that would not violate
17 a main conflict with section 1557.

18 THE COURT: Particularly in this circuit.

19 MR. GONZALEZ-PAGAN: Particularly in this circuit
20 where Kadel is the controlling precedent.

21 Not only that, Your Honor, but counsel on the other side
22 makes it -- harps on the idea that this is an instruction as to
23 explore options.

24 I would like to distinguish section 4 from section 5 of the
25 healthcare order. Section 5 of the healthcare order sets a

1 policy priority to end the improvisation of gender-affirming
2 medical care for people under 19, and tells the agency, I want
3 you to explore those options, here's a list of the things that I
4 want you to explore.

5 That is very distinct from section 4, which tells the
6 agencies to take all appropriate steps to ensure that no medical
7 institution receiving research or education grants provides this
8 care. Ensure and end are the keywords here, coupled with
9 immediately.

10 So this is a clear command by the Executive to its
11 sub-agencies to take this action. And it has created havoc. It
12 has created havoc with a perverse coercion of hospitals to
13 abandon a vulnerable minority population, otherwise risk the
14 ability to create doing a bit of research that provides health
15 innovations for all of us, or to reach all of the patients that
16 they provide care for.

17 HRSA in particular, all of that funding is intended to
18 reach vulnerable or hard to reach populations; whether they're
19 in rural parts of America or whether they're in socioeconomic
20 disadvantaged parts of America. And it actually is pitting the
21 healthcare -- a subset of people against the healthcare of
22 everybody. It's a perverse notion that should be rejected.

23 Because Kadel controls here -- and, Your Honor, I'm happy
24 to walk through all the possible ways in which this is sex
25 discrimination, but I think our brief does a good job of that.

1 THE COURT: I mean, my reading of Kadel, and I don't
2 think you're going to tell me I'm wrong, but it seems to almost
3 tie my hands a little bit. Kadel says that discrimination on
4 the basis of gender identity is discrimination on the basis of
5 sex. And Grimm verse Gloucester County says the same thing. So
6 I don't have any -- even if I were to disagree with that, that's
7 the law.

8 And in Kadel itself it said you cannot deny this
9 gender-affirming care because it is being done on the basis of
10 sex and that violates the Affordable Care Act. And it literally
11 says that. Now, admittedly, that was for care for everyone
12 under these two insurance schemes, a little bit broader than
13 what's at issue here. I'm not even talking about equal
14 protection, I'm not talking about balancing, I'm not talking
15 about factors. On the basis of sex says the Fourth Circuit
16 would seem to implicate this order. I don't see any way around
17 it.

18 Now, it would be kind of silly for me to ask you to explain
19 how I'm wrong given that I just voiced what I think is your
20 position, but tell me if I'm missing something.

21 MR. GONZALEZ-PAGAN: I don't believe so, Your Honor.
22 I think the command and the controlling precedent in this
23 circuit that the Affordable Care Act for this, the very
24 discrimination that this order is coercing hospitals to engage
25 in, makes clear and lucid that this is an order that is in

1 conflict with the very clear congressional mandate that has been
2 set forth.

3 Not only that, but there's a little bit of a conversation
4 that has happened here about well, agencies -- the regulated
5 entities bring a more ripe challenge when there's some type of
6 agency action. But if that is asking the people who are losing
7 care right now to bear the harms of losing that care waiting for
8 that agency action.

9 We know that these are the foreseeable effects on third
10 parties of the order; the President touted that himself. And
11 not only that, we know that the Plaintiffs here meet all of the
12 requirements of Stanley. They have harm, it is traceable the
13 Executive Order as admitted by the President, and it can be
14 redressed by an order of this court temporarily enjoining
15 section 4 and section 3(g) as it pertains to the provision of
16 gender-affirming medical care for people under 19. That is all
17 that is needed for a temporary restraining order at this moment
18 in time.

19 THE COURT: And with respect to the equal protection
20 issue, even assuming Kadel -- and I think it's pretty clear on
21 this, that the transgender community is entitled to intermediate
22 scrutiny, it's a quasi-protected class, or it's on the basis of
23 sex, same thing. But we are talking about an order that
24 addresses care for minors as opposed to everyone else.

25 Now, a couple things that the Government points out, I

1 think correctly, is that this may change the balancing. It may
2 change the analysis. And you saw that in Skrmetti, which is not
3 decided yet by the Supreme Court, but certainly a discussion as
4 to whether or not -- I don't think the question of whether we
5 just apply rational basis because it's medical care, because I
6 think Kadel probably answers that, that we don't. But it may
7 not answer the question of whether the youth aspect needs to be
8 factored in to the intermediate scrutiny test.

9 Do you want to speak to that at all?

10 MR. GONZALEZ-PAGAN: Well, two responses immediately
11 to that, Your Honor.

12 First, there is the question of whether this is actually on
13 all fours with care that has been instituted by other states,
14 slightly a question that has come up in Skrmetti. And the
15 answer is no. This also reaches young adults who are 18 year
16 olds like Lawrence Loe and Dylan Doe.

17 THE COURT: No, it's 19. Which I assume it's because
18 Alabama or some state, I was trying to figure out which states
19 classify a minor at 19 as opposed to 18.

20 MR. GONZALEZ-PAGAN: I think they're trying to inject
21 the Alabama definition of majority, age of majority to the
22 entire country through this order. But at the end of the day,
23 all of the justifications alluded to, with no evidence in the
24 response, does pertain to such a broad group of people. And
25 their justifications that -- as set forth in our reply brief,

1 don't hold water. When you look at the actual courts that have
2 gone to trial and looked at the evidence and listened to expert
3 testimony, like the court in Dekker and the court in Brant which
4 are cited in our briefs. This is care that has been found
5 effective, the denial of which it would cause harm. That there
6 is no evidence that there are alternative effective treatments
7 for gender dysphoria. And that every sort of medical care
8 carries risk. I think we all know that just from the human
9 experience.

10 THE COURT: Now Dekker was -- was Dekker overruled?

11 MR. GONZALEZ-PAGAN: No, Your Honor.

12 THE COURT: It wasn't.

13 MR. GONZALEZ-PAGAN: I just argued it in November and
14 it's still pending.

15 THE COURT: All right. All right. Well, you would
16 know better than me.

17 MR. GONZALEZ-PAGAN: So certainly that is still
18 binding. Not binding, but that is persuasive authority and it
19 is a valid precedent that we point to.

20 THE COURT: Is there room -- I want to ask the
21 Government this too. But if I were to engage in this question,
22 if I didn't think that Kadel answered it fully for me, the
23 manner in which -- again, per your argument that this order does
24 nothing necessarily that commands an immediate response. But
25 assuming that I think it does, the issue that I'm having, too,

1 is that the order immediately ends care. which regardless of
2 your view of whether gender-affirming care is necessary, or I
3 would use the terms real because I really have doubts that this
4 order even acknowledges it as a legitimate form of care.

5 Regardless, stopping care in the middle of receiving it, any
6 care, really casts doubt on whether, in fact, the goals are to
7 protect the recipients of the care. And I'm curious as to
8 whether the manner in which an order reflects that it should be
9 enforced can be used in weighing the various factors that are
10 required under intermediate scrutiny.

11 MR. GONZALEZ-PAGAN: Well, I think regardless of the
12 approach, ultimately it's the Government's burden to justify it
13 under Kadel, but whether it applies to minors or not. And here
14 what we do know is the lack of studying and the lack of a
15 deliberative approach that has occurred indicates, right, that
16 this is more of a political position than it is about the
17 intricacies of this care and how to approach it and whether it
18 is properly tailored to the interests that would be set forth.
19 So that is not the case here. And I think Your Honor is correct
20 that that is something that could be included there.

21 I would also add that that is a point that goes as to why a
22 TRO is needed today. The whole point of preliminary injunctive
23 relief is to preserve the status quo.

24 THE COURT: The status quo in this instance would be
25 the continued --

1 MR. GONZALEZ-PAGAN: The continuance of care prior to
2 the issuance of the Executive Orders as it pertains to
3 gender-affirming medical under section 3(g) and section 4.

4 I would also posit that there was some conversation about
5 how far it was reaching with regards to our proposed order. I
6 believe our proposed order is on point with regards to section 4
7 certainly. We are -- our third paragraph could come first,
8 right. What we're saying is that no care -- no funding should
9 be withheld or denied or terminated as it -- because an entity
10 is providing gender-affirming care, medical care, whether it's
11 being based on section 4 of the Healthcare Order or section 3(g)
12 of the Gender Order.

13 Your Honor, separate and apart from that, I would just add
14 that this is also an order that both of them put together, along
15 with the other executive actions that we've set forth in our
16 brief, that just drip with animus and reveal the true nature of
17 what's at play here.

18 Your Honor is correct that the order itself calls having a
19 gender identity consistent with one's birth assigned sex to be a
20 false belief. It questions the identity of Americans to be who
21 they are, and it erases -- or proceeds to erase their identity,
22 something that the Government cannot do. And it is placing the
23 care of some of those people at risk by coercing institutions to
24 abandon them or otherwise risk their ability to serve anybody
25 else. And because of that, this is an order that was adopted

1 not in spite of its effect but because of its effects on this
2 population, it warrants higher scrutiny separately and apart on
3 that basis.

4 And so, Your Honor, I would just posit there's no universe
5 where either the enforcement of section 4, the exploration of
6 section 4 or section 3(g) as it pertains to gender-affirming
7 medical care can survive. Because the Affordable Care Act makes
8 clear that the receipt of any federal financial assistance
9 condition be non-discriminating. Kadel controls when it comes
10 to the Affordable Care Act.

11 THE COURT: And Bostock for the ACA.

12 MR. GONZALEZ-PAGAN: And Bostock controls under the
13 ACA. And both Kadel and Mauj (phonetic), I would point to Doe
14 v. Snyder in the Ninth Circuit certainly does the same.

15 And separate and apart from that, there's just clear
16 standing to challenge these orders because of their immediate
17 and intended effect on the healthcare of people under 19 right
18 now under the Aid Protection Clause as well.

19 And so I believe Your Honor started today's conversation
20 noting that we just need to prevail on one of these theories. I
21 think we prevail on all of the ones that we have moved on under
22 the TRO, and certainly the one pertaining to the Affordable Care
23 Act, is just beyond peradventure, that there's just no way
24 around it.

25 THE COURT: Thank you.

1 MR. GONZALEZ-PAGAN: Thank you, Your Honor.

2 THE COURT: All right, Mr. Graver.

3 Might start with the point on animus. Do you want to
4 respond to that?

5 MR. GRAVER: I think -- I mean, what I would point to
6 on the animus point, that I think is Chief Judge Sutton's
7 opinion in the lower court of Skrmetti, is that in applying
8 Trump versus Hawaii, its is that it's inexplicable but for
9 animus.

10 And I think that when you're dealing with -- again, the
11 idea here, at least as we're reading the order, is to explore a
12 certain general policy directive consistent with law. I think
13 it's hard to say --

14 THE COURT: But the order, as your opposition
15 described it, and I'm reading it the same way, seems to deny
16 that this population even exists or has a right to exist.

17 MR. GRAVER: I think --

18 THE COURT: And I'm struggling with how that can't be
19 animus.

20 MR. GRAVER: I think the basic -- the only thing I
21 would emphasize for present purposes is that the standard is
22 it's inexplicable for anything but animus policy command within
23 the order. And if you can imagine how this is being applied on
24 the ground, you can see certain circumstances where a majority
25 of states have on the books restrictions in this space. It's

1 happening across Europe in different countries in different
2 measures.

3 And again, I'm thinking about those in terms coming back to
4 our prior discussion, like what are the appropriate steps,
5 concrete policy things on the ground. I think it's very hard to
6 say setting that course in action is inexplicable by anything by
7 animus. Also, for an order tailored by age and use.

8 THE COURT: Except in the age context, and this -- we
9 may not even get here, but I was thinking about the age context.
10 If you stop gender-affirming care for youth, presumably youth
11 goes through puberty, develops the sex characteristics that are
12 associated with their birth sex, and essentially you make it
13 such that the only way to in the future transition, if you
14 choose to do so, is much harder than if you had done it as a
15 young person.

16 So in many ways the fact that this order targets youth, it
17 sort of targets future adults. And it sounds kind of silly the
18 way I'm saying it, but it's different than other things. It
19 says hey, when you're at a certain age you're old enough to make
20 that decision. When you're talking about the care that's at
21 issue here, it seems to me that at a certain age it's too late
22 to even make that decision. So that's why I don't know how that
23 factors in.

24 MR. GRAVER: I take the point. I think the basic
25 part, and how these court's have grappled -- only two more. One

1 in direct response to that. I think the basic point is usually
2 the government has a little bit more of a say with respect
3 minors. And I think that's the play in the joints that's
4 contemplated.

5 THE COURT: And regardless of what I said, it's just
6 -- it's true, that certainly in the area of --

7 MR. GRAVER: From --

8 THE COURT: Then why is this 19 and not 18?

9 MR. GRAVER: As I understand it, I think we mentioned
10 it in the brief too. It's a little bit about biological reality
11 with adolescence and the like, versus more of the age of consent
12 as a formal matter.

13 THE COURT: But there are some places where the age --
14 some Plaintiffs who are legal adults who are being told they
15 can't get the care.

16 MR. GRAVER: So can I -- I think my overarching answer
17 is going to be pretty similar to the first time I was up here,
18 in that I think -- I very much appreciate the force of my
19 friend's argument. What he's mentioned, about what people have
20 been saying in the declarations, I think even with everything
21 Your Honor has said it puts the cart before the horse.

22 When we were talking about these cases, what's odd to me,
23 at least, about kind of importing hind scrutiny into this
24 context and, again splays it out on our reading of the order
25 which might differ. But this sort of strikes me as step one.

1 All of those cases which involve lengthy records, disagreements
2 between legislatures and plaintiffs, have huge bodies of
3 evidence tailored around a specific governmental action.

4 I think this is just relating to what I was saying before.
5 Is that if you understand appropriate steps, as I do, which is
6 collect your record, come up with policy solutions, follow
7 applicable law, and then you can deal with concrete policy
8 actions. Those are all the cases with this. I think it's just
9 a little bit --

10 THE COURT: How -- I mean, you said several times in
11 the brief, you may not have actually written it actually, but --

12 MR. GRAVER: No.

13 THE COURT: -- whoever wrote it --

14 MR. GRAVER: Yeah.

15 THE COURT: -- many times said, and I'm paraphrasing,
16 I know about Kadel but it was wrongly decided.

17 MR. GRAVER: So, yeah.

18 THE COURT: So tell me -- and I get it, you're stuck
19 with it. But same question that I asked the Plaintiffs. How do
20 I get around, particularly the ACA section of Kadel? I
21 understand the equal protection situation and -- but I don't
22 think Skrmetti even includes an ACA challenge as far as I can
23 tell. Because I recall during oral argument there were several
24 references to aren't you making a Bostock-like challenge to an
25 equal protection claim. I don't know how on the ACA front I can

1 do anything other than what Kadel says.

2 MR. GRAVER: Yeah. So I don't think that on this --
3 and this is going to relate back to the nature of a facial
4 challenge. I don't think on this posture Kadel is fatal at all.
5 I think it actually helps us in the in the equal protection
6 part.

7 Let me at least pause on the constitution piece and there's
8 a little more to unpack on the statute. So let me start on the
9 constitution.

10 Is that I think the most important part for present
11 purposes with Kadel, is once -- Act 156, then Chief Judge
12 Gregory explains that governments combatting what they deem to
13 be ineffective treatments is legitimate governmental interest.
14 The problem in Kadel is that on that record with that specific
15 governmental action they did not marshal a sufficient
16 justification. But Kadel left open the door that governments
17 can lawfully regulate in the space. And again, details --

18 THE COURT: So do I look at what's in the orders for
19 why the Executive is doing what they're doing? Or do I look at
20 the universe of things that you're talking about, like studies
21 out of England and --

22 MR. GRAVER: So there is no -- I think, again, this is
23 sort of the fundamental difference on how we're reading this
24 pretty differently. I am not reading this as a categorical
25 policy, at which point --

1 THE COURT: I know that. But let's say -- I mean, we
2 wouldn't even be having this conversation.

3 MR. GRAVER: I know, Your Honor. But that's why the
4 odd part of importing it back in like this is the injunction to
5 agencies to assemble the record. All the --

6 THE COURT: I know. But let's -- for purposes of this
7 conversation we are assuming that the Executive Order is an
8 order to stop funding for gender-affirming treatment. There's
9 no other way we can even be talking about it, so we're talking
10 about it.

11 MR. GRAVER: Let me then -- I think this goes back to
12 scope of relief point, which I think is important. And again,
13 just reading the proposed order, and I think there's parts that
14 we should just be cautious about accepting it.

15 Even if you agree, if you read it as that, you disagree
16 with everything I said before, we're talking about it on those
17 terms. The first thing I would emphasize is that I think it's
18 like a little bit of an internal versus external dynamic.
19 Again, as I read the order, it's essentially asking agencies to
20 explore a certain policy action. I don't --

21 THE COURT: We're -- this -- I love records, and I
22 play them, but this one is going back. And again, I don't --

23 MR. GRAVER: Even if you don't think --

24 THE COURT: My dad plays them, I don't.

25 MR. GRAVER: Even if you don't think the order says

1 that, all I mean to say is that their proposed order would cover
2 that. So the internal/external piece.

3 THE COURT: Okay. Why don't I just change gears and
4 ask you this question. There's a section of your brief that
5 says This is not discriminatory because -- and I'm paraphrasing
6 but I want to get your response to it -- because the hospitals
7 could choose to not provide this type of care to anyone and all.

8 And when I talk about this type of care, I'm getting a
9 little bit more into the details of gender-affirming care. But,
10 for example, they could choose to not provide hysterectomies for
11 anyone. They could choose to not provided hormone therapy or
12 puberty blockers for anyone. Even for those patients who
13 receiving that is for a purpose that is consistent with their
14 biological birth sex.

15 Am I reading that right, that that's the argument? Is that
16 they could choose to not provide care to anyone?

17 MR. GRAVER: What I think the more -- I wouldn't say
18 entirely. I think that -- as I understood my friends to be
19 saying, is that this kind of instruction --

20 THE COURT: No. I'm talking about what you're saying,
21 what you wrote.

22 MR. GRAVER: No, no.

23 THE COURT: Or your colleague wrote.

24 MR. GRAVER: No, no. I just want to walk back. What
25 that was in response to, as I understand kind of the argument,

1 is that asking agencies to ask this of providers or institutions
2 is per se unlawful. Because there is no possible way you can
3 make that ask, consistent with a course of conduct, consistent
4 with the law.

5 I think the formal point there is just that it's
6 technically not true. But can I offer more, I think --

7 THE COURT: But am -- it's technically not true
8 because of what I said, that you could choose to not.

9 MR. GRAVER: With any kind of grant you choose to --
10 whether comply with the conditions of the grant or forego
11 certain conduct. And I think that's the only -- as a technical
12 matter that is a choice that's being --

13 THE COURT: Because I was trying to think of an
14 example. Like you can't serve women, but that's okay -- at your
15 restaurant -- because that's okay, you don't have to
16 discriminate you can serve no one. It seems to be totally nuts.
17 And I was trying to figure out whether I was just reading it
18 wrong.

19 MR. GRAVER: And I think the intuition there
20 essentially was just distinguishing the conditions between --
21 kind of affirmative restriction versus just what you want to
22 choose to subsidize or not from the Government's perspective.

23 THE COURT: So you can see hospitals that are perhaps
24 religiously affiliated who are saying, you know what, we're not
25 going to provide this for anyone because it's the only way we

1 can get around this. But the problem I was having is these
2 hospitals want to provide the care. They don't want to make
3 that choice.

4 MR. GRAVER: The hard part, again, is really -- I'm
5 not going to keep scratching the record, but again, we're
6 talking hyper in the abstract here.

7 Let me just bring up one point, and I think this relates
8 the scope of relief part on the statutes. Is that even if you
9 disagree with us on reading the statutes, and I actually think
10 there's more to that that's important. But I don't see the
11 logic of Kadel in the statutes that are being discussed here.

12 As I understand it, again on a little bit of a higher
13 level, is that all those relate to the provision of treatment.
14 I'm not quite sure how that would apply to a standalone research
15 grant. And I don't understand how statutes can necessarily
16 apply to that.

17 If you imagine an institution that's not giving medical
18 treatments at all but is just engaged in certain research --

19 THE COURT: But that goes back to your argument that
20 this is sort of an overbroad request. Because in this instance
21 these are institutions that do provide care, and they have to
22 provide care in line with the ACA, for example. And the ACA
23 says you cannot discriminate. The Fourth Circuit has said that
24 if you make that distinction on the basis of gender identity you
25 are discriminating. And this order, according to Plaintiffs, is

1 saying you have to make that distinction.

2 MR. GRAVER: I take the point. We're sort of in the
3 somewhat middle position of like talking about how would you
4 like to lose. And the point that I was --

5 THE COURT: I've been there. I understand.

6 MR. GRAVER: The point that I'm sort of making here
7 again, is like, to the extent that we're thinking about relief,
8 I think it is grounding it in the case here. And the key point,
9 too, the reason I'm harping on it is just I'm looking at the
10 order here from the perspective of the Government in the event
11 that this afternoon we need to start implementing something.
12 What I'm pushing for is essentially something tailored to what
13 my friends have been emphasizing.

14 And I think there are distinctions here. Again, the
15 internal/external one that I was mentioning. This has nothing
16 to do with medicine. And also the distinction, perhaps, between
17 research and treatment.

18 THE COURT: Okay. So with respect to the equal
19 protection argument that I raised earlier, again, I'm not taking
20 a view on gender-affirming care; whether it's safe, whether it's
21 -- there's plenty of studies that have been cited by both sides.
22 Not just in this case but in other cases. But what's really
23 difficult for me here is that this order, the second order in
24 any event, seems to speak, admittedly at a high level, of
25 protecting children; mostly, it seems, from later regretting

1 their transition, which I recall from Skrmetti was a hotly
2 debated number as to what the percentage is.

3 MR. GRAVER: Yes.

4 THE COURT: But this question of how this order has
5 been received to immediately stop care is -- and then that the
6 President, as they pointed out, says this is the intended
7 effect.

8 This is a population that no one is disputing statistically
9 is at a higher rate for suicide, poverty, bullying, a whole host
10 -- drug addiction, unemployment. And then a number of them have
11 gone through what is dictated in these papers as this really
12 gut-wrenching process of meeting with healthcare providers,
13 their parents and everyone else. Getting to the point where
14 they get the care, they start the care, and then it gets shut
15 down in the middle of it.

16 There has to be space to acknowledge just how horribly
17 dangerous that is for anyone, for any care, but particularly for
18 this extremely vulnerable population. And I'm really having a
19 hard time with that. Because if I do get into some sort of
20 balancing with respect to the factors under equal protection, it
21 seems very difficult to accept that the goal is protection when
22 the outcome, as described in some of these affidavits, seems to
23 put these children at extreme risk; an already vulnerable
24 population pushed closer.

25 MR. GRAVER: I take your point. If I could, the two

1 things I just want to say is, I think the first is if you read
2 it as a category -- I want to -- let's just take Skrmetti first.

3 THE COURT: Don't worry -- I know what you're going to
4 say. I think I know what you're going to say. Hold on, let me
5 say it, because -- my point is, I'll accept your argument, for
6 purposes of this question, that this is not a command to do
7 anything. I'm talking about what's happened. And if it's not a
8 command why has there not been any sort of effort to roll it
9 back then if the goal is to ensure safety, I guess is the
10 question. Is that a factor I would look at.

11 That if it's being misinterpreted as an immediate command
12 to halt treatment in a manner that regardless of your view of
13 the treatment -- because if I remember Skrmetti, some of those
14 -- the law actually rolled out over a couple years which gave
15 the recipients of gender-affirming care, particularly puberty
16 blockers and hormones, the opportunity to essentially wean off
17 or move. None of that is here.

18 So I guess the question is, if it is being misinterpreted
19 as a directive I haven't heard any language saying no, no, no,
20 don't do this.

21 MR. GRAVER: I think that it's to the point we kind of
22 talked about whenever it was, awhile back. Is that to the
23 extent that there's specific directives or guidance documents
24 that convertized a dispute, that is sort of the traditional
25 fodder of a pre-enforcement challenge and a much more narrow

1 posture. And I think, you know, we had that discussion before.

2 I think on the point of the absence of the record, I think
3 just the basic point we would say is that, again, if read like
4 -- I'll take -- just using the facts of Skrmetti, just for the
5 thrust of reading, this is kind of a categorical command. I can
6 agree under the logic of Kadel.

7 Like let's say Tennessee had a restriction or ban. Again,
8 we're not -- we're dealing with funding. But had a restriction
9 or ban. Court says, you know, why did you do it? And they're
10 like, I don't know and we have no record. Yeah, that's going to
11 be tough. That's -- you know.

12 But the way in which we read it, and the parts -- at least
13 two parts of the EO that I would like to mention. Again,
14 they're not being challenged but I think they inform the
15 meaning. Is that there is a charge to the HHS secretary to take
16 90 days to research this area and return with best practices.
17 And that's coupled with, I think it was at section 9, was an
18 injunction to the agencies to get among themselves within the
19 next 60 days, come back with a report of like what you think the
20 next best steps are, and then we'll take it from there.

21 THE COURT: That -- again, going back to my initial
22 point that I don't know that that's objectionable. And, in
23 fact, I think maybe I concede that.

24 MR. GRAVER: Yeah. I think that just -- I think the
25 only thing I'll say here is that it sort of -- to sort of

1 explain sort of the mismatch here of trying to apply heightened
2 scrutiny to this, there's just very different readings of the
3 order versus whether they're starting a process or ending it.

4 THE COURT: All right. Well, on the scope of the
5 order issue, you have identified --

6 And you can sit down because I'll have them, and I think
7 it's Mr. Block who is going to address this.

8 MR. GRAVER: Okay.

9 THE COURT: Again, I don't think it's in the briefing
10 necessarily, and I'm happy to give more time to digest it if, in
11 fact, that's where we have to go. But this question of the
12 requested relief is overbroad. Do you want to speak to that?

13 MR. BLOCK: Sure, Your Honor. Our intention is to ask
14 for a TRO that is just about the context of withholding grants
15 and federal funds from entities because they provide
16 gender-affirming medical care.

17 THE COURT: So gender-affirming care, that's the
18 limitation that you're talking about.

19 MR. BLOCK: Yes. Yes. We'll have separate suits on
20 the DNEA grant stuff.

21 THE COURT: I was just going to say, I think maybe
22 you're going to be flying around the country if it's going to be
23 piece by piece, but I see your point. Which is you're
24 acknowledging that there may be areas where the President does
25 have the authority to use the language that's here. Maybe. But

1 you're not concerned with those today.

2 MR. BLOCK: Yeah, yeah. My point is not that he has
3 the authority, but that's not this lawsuit. This lawsuit is
4 about the context of withholding funds because an entity
5 provides gender-affirming medical care.

6 And so if -- we're completely fine with having that, you
7 know, clause, you know, imported into the portions of the
8 proposed order referencing 3(g). That's --

9 THE COURT: Okay.

10 MR. BLOCK: There was discussion in the brief about
11 the scope in terms of nationwide injunction. And so I just
12 wanted to make sure to address that very clearly.

13 Judge Boardman, you know, just issued a nationwide
14 injunction in the birth right citizenship case. I know there
15 are motions by the Government to stay that. But I think in this
16 case it's especially appropriate, because the scope of the
17 injunction, no matter what, has to be enough to comply --
18 provide complete relief to the parties.

19 PFLAG and GLMA are nationwide organizations. And the only
20 way to have an injunction that meets that scope of relief is to
21 have it be nationwide. And I think that it's particularly
22 compelling to look at Judge -- Justice Kavanaugh's concurrence
23 in the, you know, the Pogue case which stayed a state-wide
24 injunction.

25 But Justice Kavanaugh specifically said that when you have

1 a membership organization with members across a state or across
2 a country, then the injunction is going to have to have de facto
3 nationwide effect in order to cover those members.

4 So binding Fourth Circuit -- excuse me, binding Fourth
5 Circuit precedent authorizes these injunctions, that's
6 particularly appropriate when you have a membership
7 organization. And I think the only authority they had to the
8 contrary is a solo concurrence that was signed by the one
9 justice.

10 I want to make sure to answer any questions the Court had
11 on those issues.

12 THE COURT: I mean, there's another case challenging
13 this, I think it's by attorney generals around the country, it's
14 out in Seattle. Does that have any impact on what we're doing
15 here today in your view?

16 MR. BLOCK: No, it doesn't. I think that -- well,
17 first of all, you know, that's in another circuit; what happens
18 there doesn't necessarily control what happens here. The
19 Whitman-Walker case from 2020 talks about how it's often
20 appropriate to issue follow-along injunctions. This isn't a
21 follow-along injunction, this would be the first one.

22 I also did want to say the Defendants here are located in
23 this district. So this isn't a matter -- so I think, to the
24 extent that there's an argument about which circuit's precedent
25 should be applying, the fact that all the Defendants are located

1 here makes it particularly appropriate for them to have to
2 conform their conduct to the law, you know, as interpreted by
3 this circuit. So it's not like we're off in San Francisco
4 seeking an injunction.

5 THE COURT: Yeah. And I noticed that your proposed
6 order does not include the President of the United States, just
7 the secretaries of the -- and directors of the various agencies.
8 And that was by design?

9 MR. BLOCK: Yes. In the Iraq versus Trump case the en
10 banc Fourth Circuit said that it was inappropriate for the court
11 to issue an injunction against the President.

12 THE COURT: And you can essentially accomplish what
13 you think is appropriate here without doing that?

14 MR. BLOCK: Yes. Absolutely.

15 THE COURT: Okay. All right. Why don't I hear from
16 you on this question of scope and -- well, scope and scope; two
17 types of scope. But I'm very interested in whether the
18 limitation to gender-affirming care addresses some of the
19 concerns that you raised.

20 MR. GRAVER: I think that it is certainly less
21 overbroad than we said before. I think those are important
22 limitations to make clear. And also, again, the idea that the
23 agencies internally can start thinking about this. I read the
24 order as written to reach that. That's the other part.

25 THE COURT: Okay. And what about the nationwide

1 aspect? Because, I mean, frankly, it seems difficult not to be
2 because of, one, some of the factors they describe with respect
3 to membership and some of the legal factors, but also just the
4 confusion when we're talking about Plaintiffs who are at various
5 health -- receiving care from various places. It would seem to
6 be almost chaotic to do it any other way.

7 MR. GRAVER: Yeah.

8 THE COURT: Talk to me about that.

9 MR. GRAVER: Yeah. I think the points to balance
10 without relitigating any piece my friend mentioned, I think that
11 was actually the right intuition when you asked about the Ninth
12 Circuit Seattle case. And he says what happens over there
13 doesn't control what happens over here. Obviously they're
14 asking you to do just that and enjoin this nationwide in every
15 circuit with respect to parties that are present and not
16 present. As I understand, nationwide relief is supposed to be
17 extraordinary. I understand it's kind of, you know, more common
18 these days.

19 THE COURT: Yeah. But it doesn't make it any less
20 extraordinary. I agree with you on that.

21 MR. GRAVER: I think the point too, is that it's
22 supposed to be extraordinary and it's supposed to meet their
23 burden even if you find their arguments very persuasive. As I
24 understand it they all run towards membership and the medical
25 institutions that they are a part of it. I didn't see anything

1 in their briefing to explain why individuals who are not -- they
2 have standing to pursue relief for individuals who are not their
3 members, and institutions that their members are not a part of
4 or not related to at all.

5 THE COURT: But the Government didn't really attack
6 the institutional aspect of the standing or the membership. And
7 the argument is these PFLAG, significant membership, national
8 membership, no one took issue with that.

9 MR. GRAVER: Yeah. And I think there's a difference
10 between -- the point we were making is the difference between
11 party specific relief and not. And even if there are a lot of
12 parties, there's still a very meaningful difference between
13 party specific relief and not.

14 So I think it can be nationwide in a colloquial sense, in
15 that their members are across the nation. But that's different,
16 I think, than how we use nationwide injunction now, which is to
17 bind parties and nonparties.

18 And again, it's supposed to be a bit of a heavy burden to
19 reach into that second category. I haven't seen any arguments
20 marshalled as to why nonmembers and institutions that their
21 members do not participate in need to be covered by the scope of
22 this TRO.

23 And the part --

24 THE COURT: So what would it look like if -- it would
25 just be to these particular Plaintiffs and to -- and by that I.

1 Mean the individual Plaintiffs.

2 MR. GRAVER: I think that -- it's a difficult part
3 too, a little bit. This is what I was saying at the very, very
4 beginning of the party presentation piece. Is that when you ask
5 for a categorical facial remedy it's hard when you fall back.
6 Let's figure out ad hoc how to figure out a narrower one. And
7 again, usually when kept to party presentation principles that's
8 a problem.

9 THE COURT: But it is aware the TRO -- you know, it
10 gets a little messy with TROs, let's be honest. And I'll ask
11 you about the schedule for a PI later. But there's no doubt
12 that you're dealing with a tight record, and often a thin one,
13 although I wouldn't call this thin. I think both sides have
14 done good job with providing me with information. But there's
15 really no other way.

16 MR. GRAVER: I understand. So I think it's hard to
17 draft it on the fly, but what I can suggest is the touchstone
18 for it. Is what are -- essentially, what do the Plaintiffs have
19 standing to bring. And I think it's -- well, it's obviously
20 claims on behalf of their members. And then the Court should
21 tailor relief accordingly to make sure that those member are not
22 affected but without reaching any further than that.

23 THE COURT: Okay. All right. well, I'm going to take
24 a break for, I don't know, probably about 15, 20 minutes and
25 come back and rule, and then issue something in writing later.

1 Before I do, why don't we get it out of the way now. What
2 is the thought on a PI? You were talking about filing that and
3 I told you that you didn't have to do it on Tuesday night.
4 What's your thought?

5 MR. BLOCK: Your Honor, I think our priority, the PI
6 obviously needs to be briefed and decided within 28 days because
7 that's when the TRO, you know, expires, assuming it's extended.
8 You know, 14 days.

9 THE COURT: Yeah. I mean, that's the question. I
10 think -- yeah, that's an assumption that it would be extended
11 but I --

12 MR. BLOCK: Yes.

13 THE COURT: Anyway.

14 MR. BLOCK: So if it is 28 -- so either within 14 days
15 or within 28 days. I think that our preference would be within
16 28 days. That obviously would allow us to expand on the
17 briefing, to address some of the discussion that came up today.
18 If it was a shorter schedule it might look very similar to the
19 current briefing.

20 THE COURT: All right. But the bottom line is you
21 still intend to file for one, and I'll get the Government's view
22 on that later. I think we'll just talk about the rest of it
23 when I come back.

24 So about 20 minutes I'll be back. If everyone could try to
25 be back in here by then that would be very helpful. Obviously

1 the parties will be but I'm talking about the spectators as
2 well.

3 So we are adjourned until about, 3:10 or so.

4 THE CLERK: All rise. This Court stands in recess.

5 (RECESS was taken from 2:52-3:20 p.m.)

6 THE COURT: All right. First, thank you everybody for
7 their submissions, their arguments.

8 And the unsung hero of everything is always the court
9 reporter, so thank you. It's not easy to -- when people talk
10 over each other, and then we were getting into it a little bit
11 about some of these issues, and I appreciate everything that
12 everyone here has done to get us here today.

13 Here's what we're going to do. I'm going to issue this
14 oral ruling. Then, as I said before, I will obviously docket an
15 order. And then I intend to issue a memorandum opinion with a
16 little bit more detail.

17 But let me start by saying that I believe that the
18 Plaintiffs have met the standard for a temporary restraining
19 order. All four factors weigh in favor of enjoining the
20 implementation and enforcement of the particular section of the
21 Executive Order as it pertains to gender-affirming care.

22 First, I find there is a strong likelihood that the
23 Plaintiffs will succeed on the merits of all three claims that
24 are at issue here today.

25 The specific provisions of the order attaches strings to

1 federal funding that Congress did not attach and arguably
2 affirmatively chose not to attach.

3 Plaintiffs make a compelling case that could not be
4 accomplished through Article I is being accomplished through
5 Article II. This the Constitution does not allow.

6 Further, given that the Court is bound by the decisions in
7 Grimm verse Gloucester County School Board and Kadel verse
8 Folwell, the banning of gender-affirming care for individuals
9 who identify as transgender is subject to intermediate scrutiny.

10 The Kadel court already applied equally justice juris
11 prudence to find that a Government's refusal to cover
12 gender-affirming care runs afoul of equal protection. To be
13 clear, there is a slightly different set of circumstances at
14 play here. The Executive is directing federal agencies to
15 withhold funding to institutions that provide gender-affirming
16 care.

17 And while at least in the briefing, we didn't do it as much
18 today, the Defendants attempt to essentially relitigate Kadel,
19 and perhaps for good reason; because they want to focus on the
20 fact that in this case the Government initiated ban, if you
21 will, is on care related primarily to minors not adults, which
22 may open the door to an entirely different conversation.

23 But what nobody can dispute is that Kadel also found that
24 the denial of gender-affirming care violates the Affordable Care
25 Acts nondiscrimination clause which is not subject to balancing

1 tests or weighing of interests. And I see little difference
2 between Kadel and the gender-affirming care portions of the
3 Executive orders that are challenged here.

4 Second, Plaintiffs will face irreparable harm if the
5 Executive Order is not enjoined. To establish irreparable harm,
6 the Plaintiff must make a clear showing that it will suffer harm
7 that is neither remote nor speculative but actual and imminent.
8 Additionally, the harm must be irreparable, meaning that it
9 cannot be fully rectified by the final judgment after trial.

10 Also, it should be noted that the prospect of an
11 unconstitutional enforcement supplies the necessary irreparable
12 injury. That comes out of Air Evac EMS versus McVey, Fourth
13 Circuit case of 2022. That is because Plaintiffs have shown a
14 strong likelihood of success on their constitutional claims, the
15 irreparable harm factors arguably satisfied. More so,
16 Plaintiffs have attached unassailable documentation that they
17 are suffering irreparable harm beyond the violation of the
18 separation of powers alone.

19 In another context, the Fourth Circuit has held that the
20 irreparable harm prong is satisfied where a plaintiff suffers
21 from, quote, "Diminished access to high quality healthcare
22 suited to the individual plaintiff's needs," end quote. That's
23 from Planned Parenthood of South Atlantic versus Baker, 2019
24 case. I think it was Judge Wilkinson who wrote that opinion.

25 As Plaintiffs point out, quote, from their briefs,

1 "Transgender adolescence and young adults across the country
2 already have lost care because their providers have canceled
3 appointments, refused to fill prescriptions, or even shutdown
4 their gender-affirming medical care programs altogether," end
5 quote, and they have provided documentation to support this.

6 Further, Plaintiffs state, quote, "Families have been
7 forced to watch their children suffer, and medical providers
8 have been compelled to abandon their patients," end quote. And
9 again, there is documentation to support this in the record.

10 The circumstances in this case does yield no justification
11 to depart from the Fourth Circuit's reasoning in Baker. As the
12 sudden denial of medical care, quote, "Visits a tangible harm on
13 the health and well-being of the plaintiffs."

14 I also noted the fact that the manner in which this is
15 being implemented by the hospitals is such that it puts some of
16 the patients at further risk by cutting off treatments that
17 haven't started. Or excuse me, cutting off treatments that have
18 started.

19 Finally, the balance of equities and the public interest
20 weigh in favor of a preliminary injunction. The Court must
21 balance the significant irreparable harms identified above
22 against the harms that the Government asserts will arise from
23 temporarily enjoining the enforcement of the challenged
24 provisions of the Executive Orders. Here the balance of
25 equities in the public interests weighs strongly in favor of

1 issuing a TRO.

2 As an initial matter, the Court finds that the Government
3 is in no way harmed by the issuance of a TRO which prevents it
4 from enforcing restrictions that are likely to be found
5 unconstitutional. That comes straight from Leaders of a
6 Beautiful Struggle versus The Baltimore Police Department,
7 Fourth Circuit case in 2021.

8 And it is quote, "well established that the public interest
9 favors protecting constitutional rights." In this case it would
10 be really favors protecting the Constitution because the
11 separation of powers aspects of the Court's ruling. But further
12 executive orders threat to harm -- these Executive Orders
13 threaten to harm the lives of transgender youth, as well as
14 access to medical care for entire communities if the hospitals
15 decide to continue to provide care but lose significant federal
16 funding.

17 Also, I'd be remiss if I didn't note that the TRO maintains
18 the status quo. The Plaintiffs have clearly established that
19 they are entitled to a temporary restraining order and, thus,
20 that motion is granted.

21 Now as to the scope, I think only a nationwide injunction
22 can provide complete relief to the Plaintiffs who reside in many
23 states. The injunction applies nationwide to non-parties as
24 well.

25 A court order should not cause confusion about which

1 companies or which providers are subject to a rule and which are
2 not. A court order has to be clear and definite. And with this
3 principle in mind, I find that a piecemeal approach is not
4 appropriate in this case. Significant confusion would result
5 from preventing agencies from conditioning funding on certain
6 medical institutions while allowing conditional funding to
7 persist as to other medical institutions.

8 And while the TRO is nationwide in scope, it is limited in
9 that it simply preserves the status quo without requiring the
10 agency to take any affirmative action.

11 Additionally, I should note that PFLAG and GLMA are
12 organizational Plaintiffs suing on behalf of their members.
13 "When associations prevail in obtaining injunctive relief it can
14 reasonably be supposed that the remedy, if granted, will inure
15 to the benefit of those members of the association actually
16 injured." That's a quote from Warth versus Seldin.

17 Here PFLAG has members who, quote, "Currently receive or
18 will soon need to access the medical treatment for gender
19 dysphoria that the Executive Orders speak to prohibit," end
20 quote.

21 Additionally, GLMA includes many health professionals, this
22 is a quote, "who work in medical institutions receiving grant
23 funding from Defendants HRSA and NIH, as well as other
24 subagencies of Defendant HHS," end quote. The members of PFLAG
25 and GLMA are located throughout the country.

1 Further, a nationwide injunction against the relevant
2 portions of the Executive Orders is appropriate and necessary
3 because the orders concern a policy of national importance;
4 healthcare to transgender youth, a segment of population, and a
5 potentially even larger segment of the population if a hospital
6 lost funding to deny care to even more people.

7 So for the reasons stated here, and that I will add in an
8 opinion to be issued later, it's ordered that the Plaintiffs'
9 motion for a temporary retraining order at ECF 35 is granted.

10 It's further ordered that Defendants, the U.S. Department
11 of Health and Human Services Acting Director Dorothy Fink;
12 Health Resources and Services Administration Principal Deputy
13 Diana Espinosa; National Institutes of Health and Acting
14 Director Matthew J. Memoli; National Science Foundation and NSF
15 Director Panchanathan; and the subagencies of Defendant HHS,
16 their officers, agents, successors, servants, employees, and
17 attorneys, and other persons who are acting or are in active
18 concert or participation with them are restrained from
19 enforcing, implementing, or applying section 3(g) of the
20 Executive Order 14,682 to enforcing, implementing, or applying
21 section 4 of Executive Order 14,187, or otherwise conditioning
22 or withholding federal funding based on the fact that a
23 healthcare entity or health professional provides
24 gender-affirming medical care to a patient under 19.

25 It is further ordered that Defendants must provide written

1 notice of the Court's temporary restraining order to all
2 agencies to which the Executive Orders were addressed.

3 The written notice shall instruct those agencies that they may
4 not take steps to implement, give effect to, or reinstate under
5 a different name the directives in section 3(g) of the Gender
6 Identity Order, or section 4 of the Denial of Care Order with
7 respect to the disbursement of federal funds under open grants.

8 shall also instruct those agencies to release any
9 disbursements of funds than were paused due to the Executive
10 Order.

11 It is further ordered that Defendants shall file a status
12 report on or before February 20, 2025 apprising the Court of the
13 status of its compliance with this order, including by providing
14 a copy of the written notice described above.

15 And it is further ordered that the parties shall meet and
16 confer and file a joint status report proposing a preliminary
17 injunction briefing schedule on or before February 18th, 2025.

18 It's further ordered that the security requirement is
19 hereby waived because Defendants will not suffer any cost from
20 the preliminary injunction, and imposing a security requirement
21 would pose a hardship for Plaintiffs.

22 Now this is scheduled to last for 14 days. Like I said,
23 soon after I'll issue this written order and an opinion that
24 more fully explains the reasons. And I would ask that if you do
25 wish to extend the TRO you speak with each other about that, and

1 that would probably be factored into the scheduling on the
2 preliminary injunction.

3 Just a question for the Government would be whether there's
4 an intention to appeal the TRO, or if you're going to try to
5 wait or do you need some time to think about that. I know
6 there's been efforts to appeal in some other areas that maybe
7 haven't gone anywhere because of the nature of the order.

8 I will say the memo opinion I intend to issue will be
9 robust, perhaps more so than some of the others, at least I'm
10 trying to work on it now and that's my intention, but do you
11 have any thoughts on what you're intending to do?

12 MR. GRAVER: I don't think we can make a commitment
13 either way.

14 THE COURT: Okay. All right. That's fine.

15 All right. Anything further from the Plaintiffs?

16 MR. BLOCK: No, Your Honor.

17 THE COURT: Okay. Anything further from the Defense?

18 MR. GRAVER: No, Your Honor.

19 THE COURT: All right. And let me just say to the
20 audience who is here today, I really appreciate your engagement,
21 your following the rules, and it continues as you leave the
22 courtroom.

23 Certainly you're welcome to talk about the case and talk
24 about the immediate outcome of this, but I'd ask that you
25 obviously maintain your respect through -- well, really

1 everywhere in life, but most particularly, I don't want this to
2 be a judicial order to wreak havoc around the world. But just
3 as you're leaving the courthouse that's always important. And I
4 appreciate everybody's attention here today.

5 Court is adjourned.

6 (The proceedings concluded at 3:32 p.m.)
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17 CERTIFICATE OF OFFICIAL REPORTER

18 I, Kassandra L. McPherson, Registered Professional
19 Reporter, in and for the United States District Court for the
20 District of Maryland, do hereby certify, pursuant to 28 U.S.C. §
21 753, that the foregoing is a true and correct transcript of the
22 stenographically-reported proceedings held in the above-entitled
23 matter and that the transcript page format is in conformance
24 with the regulations of the Judicial Conference of the United
25 States.

Dated this 16 day of February 2025.

-S-

KASSANDRA L. MCPHERSON, RPR
FEDERAL OFFICIAL COURT REPORTER

1	31:16, 56:15, 60:3, 60:11, 61:6, 89:19, 90:5 3(g) [1] - 76:8 35 [1] - 89:9 36 [1] - 1:23 3:10 [1] - 83:3 3:32 [1] - 92:6	32:13, 32:22, 32:23, 43:17 abortion [1] - 16:23 above-entitled [1] - 92:20 absence [1] - 74:2 absent [1] - 34:14 absolutely [3] - 15:11, 44:23, 78:14 abstract [7] - 33:5, 37:6, 37:7, 37:8, 51:16, 51:17, 70:6 ACA [8] - 8:1, 61:11, 61:13, 65:20, 65:22, 65:25, 70:22 accelerated [1] - 3:5 accept [2] - 72:21, 73:5 acceptable [1] - 3:25 accepting [2] - 10:22, 67:14 access [4] - 3:13, 85:21, 87:14, 88:18 accomplish [3] - 29:9, 32:13, 78:12 accomplished [2] - 84:4 accomplishing [1] - 18:11 according [3] - 6:13, 10:7, 70:25 accordingly [1] - 81:21 achieve [2] - 5:11, 8:12 acknowledge [1] - 72:16 acknowledges [1] - 59:4 acknowledging [1] - 75:24 ACLU [2] - 2:9, 2:13 act [1] - 20:11 Act [13] - 7:25, 8:1, 16:2, 17:8, 18:6, 18:7, 24:12, 55:10, 55:23, 61:7, 61:10, 61:23, 66:11	acted [1] - 7:18 Acting [2] - 89:11, 89:13 acting [1] - 89:17 action [18] - 12:8, 12:12, 13:7, 19:23, 20:4, 25:21, 26:5, 32:21, 46:6, 52:12, 54:11, 56:6, 56:8, 63:6, 65:3, 66:15, 67:20, 88:10 Action [1] - 2:4 actions [6] - 10:24, 13:6, 22:14, 25:20, 60:15, 65:8 active [1] - 89:17 activities [1] - 13:11 activity [1] - 53:12 acts [1] - 8:2 Acts [1] - 84:25 actual [10] - 15:14, 16:14, 19:3, 33:5, 36:10, 38:25, 39:1, 48:8, 58:1, 85:7 ad [1] - 81:6 add [5] - 18:17, 30:7, 59:21, 60:13, 89:7 addiction [1] - 72:10 additionally [3] - 85:8, 88:11, 88:21 address [7] - 13:2, 27:13, 32:2, 33:4, 75:7, 76:12, 82:17 addressed [1] - 90:2 addresses [2] - 56:24, 78:18 addressing [1] - 9:21 adjourned [2] - 83:3, 92:5 administration [3] - 20:20, 28:24, 38:20 Administration [3] - 7:3, 11:20, 89:12 administrative [3] - 11:25, 20:3, 20:21	admitted [1] - 56:13 admittedly [3] - 7:12, 55:11, 71:24 ado [1] - 5:4 adolescence [2] - 64:11, 86:1 adopted [1] - 60:25 adults [5] - 57:15, 63:17, 64:14, 84:21, 86:1 Affairs [1] - 22:24 affected [6] - 3:22, 20:3, 31:24, 39:23, 40:5, 81:22 affects [1] - 36:14 affidavits [1] - 72:22 affiliated [1] - 69:24 affirmatively [1] - 84:2 affirming [39] - 6:17, 7:6, 7:11, 10:4, 10:19, 15:7, 15:23, 16:19, 22:11, 27:1, 29:22, 31:4, 34:16, 38:19, 49:3, 54:1, 55:9, 56:16, 59:2, 60:3, 60:10, 61:6, 63:10, 67:8, 68:9, 71:20, 73:15, 75:16, 75:17, 76:5, 78:18, 83:21, 84:8, 84:12, 84:15, 84:24, 85:2, 86:4, 89:24 Affordable [9] - 7:25, 16:2, 24:11, 55:10, 55:23, 61:7, 61:10, 61:22, 84:24 afoul [2] - 23:10, 84:12 aftermath [1] - 49:14 afternoon [3] - 2:15, 2:22, 71:11 age [10] - 7:7, 27:2, 57:21,	63:7, 63:8, 63:9, 63:19, 63:21, 64:11, 64:13 Agencies [1] - 43:16 agencies [44] - 6:5, 6:23, 7:24, 10:2, 15:13, 15:14, 20:2, 20:11, 24:10, 28:9, 28:14, 29:2, 29:4, 29:15, 33:8, 39:8, 41:5, 42:16, 44:21, 46:2, 47:19, 47:20, 47:25, 48:13, 48:15, 48:16, 51:23, 52:8, 53:16, 54:6, 54:11, 56:4, 67:5, 67:19, 69:1, 74:18, 78:7, 78:23, 84:14, 88:5, 90:2, 90:3, 90:8 agency [18] - 5:15, 12:8, 12:12, 13:9, 13:10, 13:23, 16:10, 20:4, 33:16, 41:23, 48:24, 50:2, 52:7, 52:11, 54:2, 56:6, 56:8, 88:10 agents [1] - 89:16 agree [8] - 23:1, 23:2, 23:11, 31:21, 33:24, 67:15, 74:6, 79:20 agreeing [1] - 22:20 ahead [3] - 25:2, 27:12, 32:3 Aid [1] - 61:18 aided [1] - 1:25 Air [1] - 85:12 airport [2] - 40:21, 40:23 al [4] - 1:3, 1:5, 2:4, 2:5 Alabama [2] - 57:18, 57:21 Albaugh [9] - 19:18, 19:21, 23:25, 24:1, 51:1, 51:3, 51:5,		
100 [1] - 33:15 10004 [1] - 1:13 10005 [1] - 1:16 120 [1] - 1:15 125 [1] - 1:13 13 [1] - 1:7 14 [3] - 82:8, 82:14, 90:22 14,168 [1] - 5:7 14,187 [2] - 6:1, 89:21 14,682 [1] - 89:20 15 [1] - 81:24 1557 [3] - 53:7, 53:11, 53:17 156 [1] - 66:11 16 [1] - 92:22 18 [3] - 57:15, 57:19, 64:8 18th [2] - 1:13, 90:17 19 [12] - 6:18, 7:7, 10:5, 15:23, 27:2, 54:2, 56:16, 57:17, 57:19, 61:17, 64:8, 89:24 19th [1] - 1:15 1:04 [1] - 2:1 1A [1] - 1:8	4 4 [12] - 21:14, 50:14, 53:24, 54:5, 56:15, 60:3, 60:6, 60:11, 61:5, 61:6, 89:21, 90:6 4th [1] - 1:23	5 5 [5] - 5:20, 5:21, 16:3, 53:24, 53:25 5054 [1] - 24:11 51 [1] - 1:21 525 [1] - 1:18	6 60 [1] - 74:19	7 7301 [2] - 5:19, 5:22 753 [1] - 92:19	8 8:25-cv-00337-BAH [1] - 1:4	9 9 [1] - 74:17 90 [1] - 74:16 911 [1] - 35:20 94105 [1] - 1:18	A abandon [3] - 54:13, 60:24, 86:8 ability [5] - 32:20, 38:1, 38:4, 54:14, 60:24 able [6] - 17:7,
2 20 [3] - 81:24, 82:24, 90:12 20001 [1] - 1:21 2019 [1] - 85:23 2020 [1] - 77:19 2021 [1] - 87:7 2022 [1] - 85:13 2023 [1] - 18:7 2024 [1] - 18:6 2025 [6] - 1:7, 5:6, 5:25, 90:12, 90:17, 92:22 20th [1] - 5:6 21201 [1] - 1:24 28 [5] - 82:6, 82:14, 82:15, 82:16, 92:19 28th [1] - 5:25 29th [1] - 1:18 2:52-3-20 [1] - 83:5	3 3(g) [8] - 5:12,						
3							

<p>51:18, 51:20 allegation [2] - 7:17, 8:5 allegations [1] - 7:22 allege [2] - 7:2, 8:3 alleged [1] - 7:10 allow [4] - 11:10, 37:17, 82:16, 84:5 allowed [2] - 3:19, 22:12 allowing [2] - 17:13, 88:6 allows [1] - 43:3 alluded [1] - 57:23 almost [5] - 17:24, 30:5, 37:21, 55:2, 79:6 alone [1] - 85:18 alright [1] - 34:6 alter [1] - 17:21 alternate [1] - 10:20 alternative [3] - 13:4, 13:17, 58:6 altogether [1] - 86:4 amend [1] - 13:2 amended [3] - 12:15, 12:17, 12:24 Amendment [3] - 3:15, 16:22, 17:8 America [3] - 5:19, 54:19, 54:20 American [1] - 1:12 Americans [1] - 60:20 analogies [1] - 35:18 analysis [1] - 57:2 Angeles [1] - 50:7 animus [9] - 23:20, 23:22, 60:16, 62:3, 62:6, 62:9, 62:19, 62:22, 63:7 announced [1] - 32:22 announcement [1] - 14:12</p>	<p>answer [7] - 12:23, 25:25, 45:14, 57:7, 57:15, 64:16, 77:10 answered [1] - 58:22 answers [1] - 57:6 antidiscriminati on [2] - 7:25, 8:2 anyway [2] - 50:25, 82:13 APA [4] - 12:15, 12:18, 13:5, 13:18 apart [3] - 60:13, 61:2, 61:15 appeal [2] - 91:4, 91:6 appealing [1] - 14:25 appear [1] - 31:4 applicable [7] - 6:24, 11:6, 39:6, 39:7, 44:9, 45:2, 65:7 application [4] - 30:24, 36:21, 48:11, 48:12 applications [3] - 46:11, 47:21, 53:9 applied [5] - 12:13, 40:3, 47:24, 62:23, 84:10 applies [6] - 46:9, 48:24, 50:15, 51:3, 59:13, 87:23 apply [8] - 4:20, 33:7, 35:6, 38:11, 57:5, 70:14, 70:16, 75:1 applying [7] - 13:8, 31:15, 36:18, 62:7, 77:25, 89:19, 89:20 appointments [3] - 10:12, 35:24, 86:3 appreciate [7] - 3:9, 4:8, 27:22, 64:18, 83:11, 91:20, 92:4 apprising [1] - 90:12 approach [5] -</p>	<p>45:19, 59:12, 59:15, 59:17, 88:3 appropriate [30] - 6:6, 10:3, 11:24, 13:15, 20:5, 20:17, 23:1, 23:2, 28:15, 28:17, 34:4, 34:6, 36:3, 44:5, 44:6, 45:18, 45:21, 46:3, 48:13, 54:6, 63:4, 65:5, 76:16, 77:6, 77:20, 78:1, 78:13, 88:4, 89:2 Appropriations [1] - 17:8 appropriations [1] - 17:6 approved [1] - 9:2 arbitrary [4] - 13:20, 13:22, 13:23, 23:17 area [3] - 31:3, 64:6, 74:16 areas [2] - 75:24, 91:6 arguably [2] - 84:1, 85:15 argue [6] - 4:3, 9:18, 40:3, 30:6, 46:16, 49:6 argued [2] - 3:23, 58:13 arguing [2] - 17:25, 46:17 argument [20] - 14:6, 17:3, 19:6, 21:18, 23:11, 23:14, 26:3, 32:12, 52:9, 53:8, 58:23, 64:19, 65:23, 68:15, 68:25, 70:19, 71:19, 73:5, 77:24, 80:7 arguments [8] - 4:3, 9:3, 9:12, 9:15, 33:5, 79:23, 80:19, 83:7 arise [1] - 86:22 arrangements [1] - 10:20 Article [6] - 17:18, 43:20, 52:2,</p>	<p>84:4, 84:5 artists [1] - 50:6 aside [2] - 28:11, 48:16 aspect [4] - 42:23, 57:7, 79:1, 80:6 aspects [3] - 13:24, 52:23, 87:11 assemble [1] - 67:5 asserts [1] - 86:22 assess [7] - 5:16, 21:3, 41:23, 43:16, 46:3, 50:3, 51:9 assigned [1] - 60:19 assistance [3] - 4:14, 53:13, 61:8 assistant [1] - 22:24 associated [1] - 63:12 association [1] - 88:15 associations [2] - 7:15, 88:13 assume [3] - 48:16, 51:1, 57:17 assuming [5] - 5:1, 56:20, 58:25, 67:7, 82:7 assumption [1] - 82:10 Atlantic [1] - 85:23 attach [3] - 17:7, 84:1, 84:2 attached [1] - 85:16 attaches [1] - 83:25 attack [2] - 37:17, 80:5 attain [1] - 8:13 attempt [4] - 15:17, 18:18, 20:16, 84:18 attempted [1] - 18:3 attempting [1] - 18:14 attention [2] - 18:2, 92:4 attorney [1] - 77:13</p>	<p>attorneys [1] - 89:17 audible [1] - 4:2 audience [2] - 3:11, 91:20 authority [13] - 5:20, 6:9, 6:11, 7:18, 13:5, 17:12, 19:24, 42:20, 43:1, 58:18, 75:25, 76:3, 77:7 authorized [2] - 17:22, 26:6 authorizes [2] - 16:11, 77:5 authorizing [3] - 15:15, 15:19, 17:5 Avenue [1] - 1:21 avenues [1] - 34:17 await [1] - 25:9 award [3] - 12:11, 15:16, 29:7 awarded [2] - 29:1, 45:1 aware [1] - 81:9 awfully [1] - 37:5 awhile [1] - 73:22</p>	<p>basic [4] - 62:20, 63:24, 64:1, 74:3 basis [13] - 8:7, 29:2, 29:10, 53:15, 55:4, 55:9, 55:15, 56:22, 57:5, 61:3, 70:24 bear [1] - 56:7 beat [1] - 47:17 Beautiful [1] - 87:6 BEFORE [1] - 1:10 beg [1] - 12:14 begin [2] - 9:11, 9:24 beginning [1] - 81:4 behalf [5] - 2:9, 2:13, 2:16, 81:20, 88:12 Behalf [2] - 1:11, 1:19 behind [3] - 38:14, 41:1, 50:19 belief [1] - 60:20 believes [1] - 42:23 bench [2] - 53:2, 53:3 benefit [4] - 37:16, 37:21, 52:14, 88:15 best [4] - 4:5, 9:10, 74:16, 74:20 better [2] - 26:15, 58:16 between [7] - 65:2, 69:20, 71:16, 80:10, 80:12, 85:2 beyond [9] - 16:22, 30:25, 31:20, 31:23, 38:16, 43:4, 50:15, 61:23, 85:17 biased [1] - 36:21 bicameralism [1] - 7:19 Biden [1] - 28:25 big [1] - 29:9 Bill [2] - 19:13, 19:14 billion [1] - 16:3 bills [3] - 17:6,</p>
---	---	---	---	---	--

22:25, 23:4 Bills [1] - 18:5 bind [1] - 80:17 binding [6] - 19:21, 24:16, 58:18, 77:4 Biological [1] - 5:8 biological [2] - 64:10, 68:14 birth [4] - 60:19, 63:12, 68:14, 76:14 bit [27] - 3:5, 3:13, 8:12, 14:5, 28:2, 28:23, 29:21, 37:18, 47:6, 48:5, 51:2, 51:18, 54:14, 55:3, 55:12, 56:3, 64:2, 64:10, 65:9, 67:18, 68:9, 70:12, 80:18, 81:3, 83:10, 83:16 blah [3] - 42:10 blanket [2] - 16:3, 42:9 Block [6] - 1:17, 2:8, 2:16, 9:3, 9:11, 75:7 BLOCK [39] - 1:12, 2:8, 9:20, 9:24, 11:13, 11:18, 12:21, 12:23, 13:21, 14:14, 15:11, 16:7, 17:2, 18:16, 20:1, 21:8, 21:20, 21:25, 23:4, 23:13, 24:4, 24:6, 25:5, 27:3, 27:5, 27:13, 27:16, 27:19, 75:13, 75:19, 76:2, 76:10, 77:16, 78:9, 78:14, 82:5, 82:12, 82:14, 91:16 blockers [2] - 68:12, 73:16 blow [3] - 29:6, 33:18, 42:17 board [5] - 15:20, 16:9, 33:3, 42:9, 42:13 Board [1] - 84:7	Boardman [1] - 76:13 bodies [1] - 65:2 boilerplate [4] - 11:4, 11:9, 26:12, 33:21 bolts [1] - 36:2 bone [1] - 46:3 books [1] - 62:25 Bostock [4] - 18:18, 61:11, 61:12, 65:24 Bostock-like [1] - 65:24 Boston [1] - 10:12 bottom [1] - 82:20 bound [1] - 84:6 branch [8] - 3:17, 5:24, 13:11, 13:16, 43:22, 44:8, 52:18 Brant [1] - 58:3 break [3] - 52:23, 53:1, 81:24 BRENDAN [1] - 1:10 brief [10] - 7:8, 14:10, 25:19, 54:25, 57:25, 60:16, 64:10, 65:11, 68:4, 76:10 briefed [2] - 50:16, 82:6 briefing [8] - 38:9, 50:23, 75:9, 80:1, 82:17, 82:19, 84:17, 90:17 briefs [2] - 58:4, 85:25 Bright [2] - 52:5, 52:13 bring [8] - 15:8, 20:4, 20:5, 36:17, 40:6, 56:5, 70:7, 81:19 Broad [1] - 1:13 broad [3] - 38:21, 46:2, 57:24 broader [1] - 55:12 brought [2] - 3:2, 23:17 brush [1] - 38:21 bullying [1] - 72:9 burden [4] - 48:5, 59:12, 79:23, 80:18	but.. [1] - 3:3 C CA [1] - 1:18 canceled [2] - 10:19, 86:2 cancelling [1] - 10:12 cannot [9] - 7:6, 22:3, 29:17, 44:7, 53:15, 55:8, 60:22, 70:23, 85:9 capacity [1] - 12:25 capricious [4] - 13:20, 13:22, 13:23, 23:18 Care [13] - 6:3, 7:25, 10:2, 14:20, 16:2, 24:12, 55:10, 55:23, 61:7, 61:10, 61:22, 84:24, 90:6 care [94] - 6:17, 6:19, 7:7, 7:11, 10:4, 10:9, 10:17, 10:19, 15:7, 15:23, 16:19, 16:23, 19:5, 21:24, 22:4, 24:13, 26:20, 27:2, 27:8, 29:22, 30:4, 30:9, 30:12, 31:4, 34:17, 35:23, 37:21, 38:19, 39:25, 41:4, 41:7, 49:3, 54:2, 54:8, 54:16, 55:9, 55:11, 56:7, 56:16, 56:24, 57:5, 57:13, 58:4, 58:7, 59:1, 59:2, 59:4, 59:5, 59:6, 59:7, 59:17, 60:1, 60:8, 60:10, 60:23, 61:7, 63:10, 63:20, 64:15, 68:7, 68:8, 68:9, 68:16, 70:2, 70:21, 70:22, 71:20, 72:5, 72:14, 72:17, 73:15, 75:16,	75:17, 76:5, 78:18, 79:5, 83:21, 84:8, 84:12, 84:16, 84:21, 84:24, 85:2, 86:2, 86:4, 86:12, 87:14, 87:15, 89:6, 89:24 carried [1] - 20:20 carries [1] - 58:8 carrying [1] - 13:16 cart [1] - 64:21 carve [1] - 21:17 case [56] - 4:3, 4:6, 7:14, 8:9, 8:23, 8:24, 11:8, 18:8, 18:11, 19:2, 19:10, 19:20, 19:23, 19:25, 20:2, 23:17, 24:6, 24:7, 24:8, 25:17, 25:19, 25:23, 26:1, 28:5, 29:10, 34:23, 36:4, 36:10, 36:15, 40:16, 45:8, 45:9, 47:5, 50:16, 51:5, 59:19, 71:8, 71:22, 76:14, 76:16, 76:23, 77:12, 77:19, 78:9, 79:12, 84:3, 84:20, 85:13, 85:24, 86:10, 87:7, 87:9, 88:4, 91:23 CASE [1] - 1:4 cases [14] - 18:17, 19:2, 19:3, 19:7, 19:18, 24:1, 25:6, 40:15, 42:21, 46:5, 64:22, 65:1, 65:8, 71:22 cashes [1] - 52:15 casts [1] - 59:6 categorical [7] - 28:6, 30:23, 31:23, 33:3, 66:24, 74:5, 81:5 category [3] - 51:20, 73:2, 80:19	causation [2] - 25:18, 26:9 caused [1] - 27:8 caution [1] - 18:17 cautious [1] - 67:14 CDC [9] - 7:9, 12:1, 12:5, 12:19, 23:15, 30:2, 39:21, 39:24, 39:25 cease [2] - 10:17, 30:4 celebrating [1] - 11:1 cell [1] - 3:19 certain [15] - 11:22, 18:4, 23:7, 28:4, 38:17, 42:15, 44:21, 62:12, 62:24, 63:19, 63:21, 67:20, 69:11, 70:18, 88:5 certainly [13] - 4:8, 11:15, 14:5, 32:17, 39:21, 57:3, 58:17, 60:7, 61:14, 61:22, 64:6, 78:20, 91:23 CERTIFICATE [1] - 92:17 certify [1] - 92:19 cessation [1] - 49:6 Chadha [1] - 24:4 challenge [26] - 20:5, 25:10, 26:23, 30:24, 31:23, 32:16, 33:3, 34:24, 35:3, 35:5, 36:21, 38:4, 38:21, 39:4, 40:6, 41:8, 47:22, 47:24, 51:15, 51:17, 56:5, 61:16, 65:22, 65:24, 66:4, 73:25 challenged [3] - 74:14, 85:3, 86:23 challenges [1] - 35:4 challenging [2] - 31:7, 77:12	change [9] - 20:14, 22:9, 22:10, 32:20, 32:23, 44:20, 57:1, 57:2, 68:3 changes [2] - 18:20, 27:8 changing [1] - 41:12 channels [1] - 11:24 chaotic [1] - 79:6 characteristics [1] - 63:11 charge [1] - 74:15 charges [1] - 28:9 charging [1] - 43:21 Charles [1] - 1:23 check [2] - 27:11, 32:23 Chemical [1] - 6:1 chemical [2] - 6:7, 29:19 Chief [3] - 52:1, 62:6, 66:11 Children [3] - 6:1, 6:3, 18:6 children [5] - 6:8, 29:20, 71:25, 72:23, 86:7 Childrens [4] - 10:8, 10:11, 10:21, 10:22 choice [3] - 35:11, 69:12, 70:3 choices [1] - 21:1 choose [9] - 26:20, 63:14, 68:7, 68:10, 68:11, 68:16, 69:8, 69:9, 69:22 choosing [1] - 30:21 chose [1] - 84:2 Circuit [19] - 11:7, 18:9, 24:7, 24:23, 40:16, 40:25, 45:9, 47:6, 51:5, 55:15, 61:14, 70:23, 77:4, 77:5, 78:10, 79:12, 85:13, 85:19, 87:7 circuit [7] - 19:20, 53:18, 53:19, 55:23, 77:17, 78:3, 79:15
--	--	--	--	--	--

circuit's [1] - 77:24 Circuit's [1] - 86:11 circumstance [5] - 32:19, 35:9, 43:18, 46:8, 49:19 circumstances [11] - 35:7, 35:12, 36:3, 38:15, 47:17, 50:19, 51:17, 52:2, 62:24, 84:13, 86:10 cite [4] - 15:18, 15:25, 25:19, 43:21 cited [4] - 13:5, 15:14, 58:4, 71:21 cites [6] - 5:18, 6:9, 14:19, 19:19, 24:8, 43:1 cities [1] - 18:12 citing [1] - 17:11 citizenship [2] - 25:25, 76:14 City [3] - 18:8, 47:4, 47:5 CIVIL [1] - 1:4 Civil [2] - 1:12, 2:4 civility [1] - 47:12 claim [9] - 12:15, 12:18, 13:5, 13:18, 14:2, 23:16, 36:2, 37:5, 65:25 claiming [1] - 19:24 claims [6] - 7:17, 8:16, 37:3, 81:20, 83:23, 85:14 class [1] - 56:22 classify [1] - 57:19 Clause [1] - 61:18 clause [3] - 47:6, 76:7, 84:25 clauses [1] - 7:20 clear [23] - 5:21, 8:23, 14:7, 15:5, 29:16, 29:22, 29:23, 35:22, 40:25, 41:3, 46:22, 47:9, 47:12, 54:10,	55:25, 56:1, 56:20, 61:8, 61:15, 78:22, 84:13, 85:6, 88:2 clear-cut [1] - 47:12 clearer [1] - 33:25 clearly [2] - 76:12, 87:18 CLERK [2] - 2:3, 83:4 clients [3] - 10:17, 10:22, 25:14 Clinton [1] - 17:20 clock [1] - 41:25 clocks [2] - 24:24, 45:9 closer [3] - 17:23, 51:19, 72:24 closure [1] - 11:1 closures [1] - 10:14 clothing [1] - 4:16 co [1] - 2:10 co-counsel [1] - 2:10 Code [1] - 5:20 codify [1] - 22:25 coercing [2] - 55:24, 60:23 coercion [1] - 54:12 colleague [1] - 68:23 collect [3] - 29:9, 46:3, 65:6 colloquial [1] - 80:14 combatting [1] - 66:12 combine [1] - 33:14 coming [5] - 35:19, 38:21, 39:15, 49:16, 63:3 command [13] - 28:13, 30:4, 48:18, 51:8, 52:4, 54:10, 55:22, 62:22, 73:6, 73:8, 73:11, 74:5 commanded [1] - 51:13 commanding [1] - 49:6 commands [1] - 58:24	Commerce [1] - 25:19 commitment [1] - 91:12 common [2] - 47:2, 79:17 communication [1] - 15:13 communities [1] - 87:14 community [1] - 56:21 companies [1] - 88:1 compare [1] - 43:24 compatible [1] - 18:22 compelled [1] - 86:8 compelling [2] - 76:22, 84:3 complaint [5] - 12:16, 12:17, 12:24, 13:2, 40:14 complaints [1] - 4:17 complete [2] - 76:18, 87:22 completely [8] - 3:22, 3:25, 4:10, 12:11, 13:15, 17:6, 34:17, 76:6 compliance [2] - 26:14, 90:13 comply [3] - 14:23, 69:10, 76:17 Computer [1] - 1:25 Computer-aided [1] - 1:25 concede [1] - 74:23 conceivable [2] - 38:6, 48:12 conceive [1] - 51:16 concepts [1] - 18:21 concern [2] - 32:15, 89:3 concerned [2] - 25:24, 76:1 concerns [2] - 32:2, 78:19 concert [1] - 89:18	concertized [1] - 33:5 concluded [1] - 92:6 concrete [4] - 39:1, 46:7, 63:5, 65:7 concurrence [2] - 76:22, 77:8 condition [2] - 32:18, 61:9 conditional [1] - 88:6 conditioning [2] - 88:5, 89:21 conditions [17] - 5:16, 16:12, 17:7, 17:9, 20:14, 22:5, 22:9, 24:25, 31:18, 33:6, 35:9, 41:23, 42:12, 42:15, 50:3, 69:10, 69:20 conduct [4] - 5:23, 69:3, 69:11, 78:2 confer [1] - 90:16 conference [1] - 14:15 Conference [1] - 92:21 confine [2] - 36:15, 39:22 confines [1] - 36:10 conflict [4] - 7:24, 14:1, 53:17, 56:1 conflicts [4] - 12:5, 24:11, 24:14, 25:8 conform [1] - 78:2 conformance [1] - 92:20 confrontile [1] - 51:16 confusion [3] - 79:4, 87:25, 88:4 Congress [21] - 7:21, 16:16, 17:4, 17:6, 17:9, 17:17, 17:22, 18:2, 18:3, 18:4, 18:9, 18:14, 18:15, 18:24, 19:13, 19:14, 21:19, 23:5,	25:8, 37:1, 84:1 Congress's [3] - 24:14, 30:14, 36:25 Congressional [1] - 16:21 congressional [3] - 17:12, 19:23, 56:1 connection [1] - 5:1 consent [1] - 64:11 consequence [1] - 20:22 consequences [1] - 10:6 consider [4] - 13:24, 13:25, 16:13, 49:13 considered [1] - 18:10 consistent [20] - 11:5, 28:10, 28:11, 29:1, 29:2, 42:7, 44:6, 44:8, 45:1, 45:2, 45:19, 45:23, 48:13, 51:6, 51:25, 60:19, 62:12, 68:13, 69:3 Constitution [5] - 5:18, 6:10, 43:2, 84:5, 87:10 constitution [2] - 66:7, 66:9 constitutional [5] - 23:3, 23:5, 23:19, 85:14, 87:9 construe [1] - 13:17 contained [1] - 46:6 contemplated [1] - 64:4 contend [1] - 6:20 contending [1] - 46:12 context [9] - 11:18, 30:21, 30:25, 63:8, 63:9, 64:24, 75:14, 76:4, 85:19 continuance [1] - 60:1 continue [3] - 15:6, 17:1,	87:15 continued [1] - 59:25 continues [1] - 91:21 continuing [1] - 27:1 contract [1] - 19:20 contrary [2] - 13:21, 77:8 control [3] - 17:13, 77:18, 79:13 controlling [2] - 53:20, 55:22 controls [3] - 54:23, 61:9, 61:12 controversy [2] - 36:11, 36:15 conventional [1] - 48:3 conversation [6] - 56:3, 60:4, 61:19, 67:2, 67:7, 84:22 conversations [1] - 3:7 convertized [2] - 51:14, 73:24 cool [1] - 28:13 coordination [1] - 41:17 copy [1] - 90:14 core [2] - 23:23, 52:2 corners [2] - 43:23, 46:6 correct [7] - 33:15, 46:19, 50:11, 50:15, 59:19, 60:18, 92:19 correctly [2] - 24:19, 57:1 cost [2] - 45:20, 90:19 costs [1] - 29:7 couch [1] - 33:10 counsel [4] - 2:7, 2:10, 53:8, 53:21 countries [1] - 63:1 country [6] - 46:15, 57:22, 75:22, 77:2, 77:13, 86:1 county [1] - 88:25
---	--	---	---	--	---

<p>County [7] - 18:8, 40:16, 40:19, 41:2, 47:5, 55:5, 84:7</p> <p>County's [1] - 47:4</p> <p>couple [4] - 3:18, 42:14, 56:25, 73:14</p> <p>coupled [2] - 54:8, 74:17</p> <p>course [9] - 13:5, 13:9, 13:23, 14:25, 15:16, 19:5, 47:4, 63:6, 69:3</p> <p>court [16] - 19:8, 36:19, 39:6, 51:10, 52:9, 56:14, 58:3, 62:7, 74:9, 78:10, 83:8, 84:10, 87:25, 88:2, 92:5</p> <p>COURT [146] - 1:1, 2:11, 2:14, 2:17, 2:21, 2:24, 3:1, 4:24, 9:23, 11:11, 11:15, 12:14, 12:22, 13:19, 14:4, 15:5, 15:24, 17:1, 17:23, 19:17, 21:2, 21:11, 21:21, 22:20, 23:6, 23:22, 24:5, 24:16, 26:17, 27:4, 27:10, 27:15, 27:17, 27:20, 27:24, 28:15, 28:19, 29:12, 30:2, 31:2, 31:6, 31:11, 32:1, 32:5, 32:8, 32:10, 33:9, 33:24, 34:6, 34:12, 35:15, 35:17, 36:23, 37:7, 37:11, 39:14, 40:8, 40:12, 40:18, 40:23, 41:14, 42:8, 42:19, 43:6, 43:9, 44:3, 44:11, 44:15, 45:3, 46:13, 46:20, 48:19, 48:22, 49:2,</p>	<p>49:5, 49:22, 49:25, 50:14, 50:24, 52:5, 52:20, 52:22, 52:25, 53:18, 55:1, 56:19, 57:17, 58:10, 58:12, 58:15, 58:20, 59:24, 61:11, 61:25, 62:2, 62:14, 62:18, 63:8, 64:5, 64:8, 64:13, 65:10, 65:13, 65:15, 65:18, 66:18, 67:1, 67:6, 67:21, 67:24, 68:3, 68:20, 68:23, 69:7, 69:13, 69:23, 70:19, 71:5, 71:18, 72:4, 73:3, 74:21, 75:4, 75:9, 75:17, 75:21, 76:9, 77:12, 78:5, 78:12, 78:15, 78:25, 79:8, 79:19, 80:5, 80:24, 81:9, 81:23, 82:9, 82:13, 82:20, 83:6, 91:14, 91:17, 91:19, 92:25</p> <p>Court [22] - 2:3, 2:5, 3:16, 13:15, 13:17, 14:23, 19:3, 26:5, 31:22, 36:13, 47:23, 48:9, 49:17, 57:3, 77:10, 81:20, 83:4, 84:6, 86:20, 87:2, 90:12, 92:18</p> <p>court's [2] - 52:7, 63:25</p> <p>Court's [3] - 29:5, 87:11, 90:1</p> <p>courthouse [1] - 92:3</p> <p>Courtroom [1] - 1:8</p> <p>courtroom [6] - 3:12, 4:1, 4:9, 4:13, 4:19, 91:22</p> <p>courts [3] - 45:24,</p>	<p>52:6, 58:1</p> <p>cover [3] - 68:1, 77:3, 84:11</p> <p>covered [1] - 80:21</p> <p>create [1] - 54:14</p> <p>created [2] - 54:11, 54:12</p> <p>credible [2] - 11:22, 39:5</p> <p>credibly [2] - 30:3, 49:6</p> <p>crisis [1] - 20:10</p> <p>criteria [2] - 15:16, 16:19</p> <p>criterion [1] - 16:16</p> <p>cross [1] - 22:19</p> <p>cross-subsidize [1] - 22:19</p> <p>CSOs [1] - 4:16</p> <p>curious [2] - 12:17, 59:7</p> <p>current [1] - 82:19</p> <p>cut [10] - 9:19, 11:24, 15:20, 26:20, 26:21, 35:2, 41:7, 42:6, 45:6, 47:12</p> <p>cut-off [1] - 15:20</p> <p>cutting [4] - 12:3, 21:3, 86:16, 86:17</p>	<p>8:11, 44:13, 47:14, 87:15</p> <p>decided [6] - 19:9, 19:11, 47:23, 57:3, 65:16, 82:6</p> <p>decision [4] - 29:5, 46:17, 63:20, 63:22</p> <p>decisions [1] - 84:6</p> <p>declaration [3] - 10:7, 13:1, 15:21</p> <p>declarations [1] - 64:20</p> <p>declares [1] - 5:13</p> <p>decorum [1] - 4:8</p> <p>deem [1] - 66:12</p> <p>defect [1] - 33:4</p> <p>Defendant [3] - 7:2, 88:24, 89:15</p> <p>Defendants [13] - 1:6, 1:19, 2:23, 2:25, 6:20, 77:22, 77:25, 84:18, 88:23, 89:10, 89:25, 90:11, 90:19</p> <p>Defending [5] - 5:7, 21:12, 31:16, 41:21, 50:1</p> <p>Defense [2] - 1:15, 91:17</p> <p>defer [1] - 19:7</p> <p>deference [1] - 52:8</p> <p>defiance [1] - 19:12</p> <p>definite [1] - 88:2</p> <p>definition [1] - 57:21</p> <p>definitions [1] - 29:22</p> <p>Dekker [3] - 58:3, 58:10</p> <p>delegated [2] - 13:9, 17:16</p> <p>delegates [1] - 16:13</p> <p>deliberative [1] - 59:15</p> <p>demand [1] - 23:7</p> <p>democratic [6] - 18:25, 19:7, 19:9, 19:10, 19:13, 19:15</p>	<p>Denial [4] - 6:3, 10:1, 14:20, 90:6</p> <p>denial [3] - 58:5, 84:24, 86:12</p> <p>denied [1] - 60:9</p> <p>deny [3] - 55:8, 62:15, 89:6</p> <p>depart [1] - 86:11</p> <p>Department [6] - 25:18, 48:25, 49:1, 49:2, 87:6, 89:10</p> <p>Deputy [1] - 89:12</p> <p>deputy [1] - 5:3</p> <p>describe [1] - 79:2</p> <p>described [3] - 62:15, 72:22, 90:14</p> <p>describes [1] - 21:14</p> <p>describing [2] - 35:5, 42:14</p> <p>design [1] - 78:8</p> <p>desire [1] - 44:21</p> <p>desired [1] - 15:9</p> <p>despite [1] - 4:4</p> <p>detail [2] - 25:17, 83:16</p> <p>details [2] - 66:17, 68:9</p> <p>determine [2] - 47:9, 52:10</p> <p>develop [3] - 29:10, 37:17, 46:4</p> <p>developing [1] - 26:25</p> <p>development [1] - 52:3</p> <p>develops [2] - 48:25, 63:11</p> <p>Diana [1] - 89:13</p> <p>dictated [1] - 72:11</p> <p>differ [1] - 64:25</p> <p>difference [5] - 66:23, 80:9, 80:10, 80:12, 85:1</p> <p>different [19] - 38:7, 38:10, 39:10, 40:7, 42:11, 43:12, 43:13, 43:14, 46:11, 47:14, 49:18, 63:1, 63:18, 75:2, 80:15, 84:13,</p>	<p>84:22, 90:5</p> <p>differently [2] - 44:15, 66:24</p> <p>difficult [6] - 3:13, 35:17, 71:23, 72:21, 79:1, 81:2</p> <p>digest [1] - 75:10</p> <p>Diminished [1] - 85:21</p> <p>direct [5] - 7:24, 39:8, 41:12, 42:5, 64:1</p> <p>directed [2] - 34:15, 40:19</p> <p>directing [4] - 22:14, 31:17, 37:1, 84:14</p> <p>direction [1] - 33:8</p> <p>directions [2] - 20:9, 37:2</p> <p>directive [8] - 7:10, 28:8, 31:15, 33:18, 40:20, 46:2, 62:12, 73:19</p> <p>directives [4] - 23:9, 46:14, 73:23, 90:5</p> <p>directly [4] - 11:7, 44:1, 44:3, 44:4</p> <p>Director [3] - 89:11, 89:14, 89:15</p> <p>director [1] - 41:17</p> <p>directors [1] - 78:7</p> <p>directs [4] - 5:15, 6:5, 6:14, 48:13</p> <p>disadvantaged [1] - 54:20</p> <p>disagree [6] - 42:3, 44:11, 47:18, 55:6, 67:15, 70:9</p> <p>disagreeing [2] - 29:14, 44:16</p> <p>disagreements [1] - 65:1</p> <p>disastrous [1] - 20:22</p> <p>disbursement [1] - 90:7</p> <p>disbursements [1] - 90:9</p> <p>discrete [4] - 46:5, 51:8, 52:4</p> <p>discretion [2] -</p>
---	--	---	---	--	---

<p>16:13, 51:13 discriminate [3] - 53:15, 69:16, 70:23 discriminating [3] - 8:6, 61:9, 70:25 discrimination [5] - 7:22, 54:25, 55:3, 55:4, 55:24 discriminatory [2] - 38:12, 68:5 discuss [1] - 45:12 discussed [1] - 70:11 discussion [6] - 45:9, 57:3, 63:4, 74:1, 76:10, 82:17 disingenuous [1] - 30:5 dispute [6] - 8:24, 36:10, 39:1, 51:14, 73:24, 84:23 disputing [1] - 72:8 disregard [1] - 14:17 distinct [1] - 54:5 distinction [3] - 70:24, 71:1, 71:16 distinctions [1] - 71:14 distinguish [3] - 19:21, 19:25, 53:24 distinguishes [2] - 19:2, 20:12 distinguishing [2] - 24:1, 69:20 district [1] - 77:23 DISTRICT [2] - 1:1, 1:1 District [5] - 3:16, 14:23, 92:18, 92:19 dive [1] - 45:11 DIVISION [1] - 1:2 DNEA [1] - 75:20 docket [1] - 83:14 documentation [3] - 85:16, 86:5, 86:9 documents [2] - 36:7, 73:23 Doe [2] - 57:16,</p>	<p>61:13 Donald [1] - 2:5 DONALD [1] - 1:5 done [8] - 3:7, 10:17, 15:19, 27:7, 55:9, 63:14, 81:14, 83:12 door [3] - 4:11, 66:16, 84:22 Dorothy [1] - 89:11 doubt [5] - 10:23, 12:6, 52:14, 59:6, 81:11 doubts [1] - 59:3 down [9] - 3:2, 4:12, 23:15, 27:22, 39:11, 46:25, 48:6, 72:15, 75:6 Dr [1] - 10:7 draft [1] - 81:17 drew [1] - 18:2 drip [1] - 60:16 drug [1] - 72:10 due [1] - 90:9 during [1] - 65:23 Dylan [1] - 57:16 dynamic [3] - 38:12, 40:7, 67:18 dysphoria [2] - 58:7, 88:19</p>	<p>45:5 effects [9] - 10:24, 14:8, 25:14, 26:13, 32:17, 33:2, 38:24, 56:9, 61:1 effectuate [1] - 44:21 effort [2] - 3:10, 73:8 efforts [2] - 4:8, 91:6 either [9] - 6:4, 13:18, 15:12, 16:1, 24:21, 42:1, 61:5, 82:14, 91:13 eliminates [1] - 12:6 elsewhere [2] - 10:12, 10:13 email [22] - 7:5, 12:19, 14:11, 14:12, 14:14, 14:16, 21:10, 29:25, 30:2, 34:1, 34:7, 34:10, 34:12, 35:6, 37:15, 37:18, 37:24, 37:25, 39:16, 39:21, 39:22, 39:23 emails [8] - 34:1, 34:13, 38:5, 40:1, 40:2, 46:14, 47:20, 48:17 emphasize [3] - 41:10, 62:21, 67:17 emphasizing [1] - 71:13 employees [5] - 5:23, 17:13, 23:9, 43:3, 89:16 EMS [1] - 85:12 en [1] - 78:9 enact [2] - 17:3, 37:13 enacted [1] - 17:9 enacting [2] - 7:5, 16:21 enacts [1] - 42:22 end [15] - 9:14, 10:9, 12:6, 12:8, 33:21, 40:24, 46:1, 54:1, 54:8,</p>	<p>57:22, 85:22, 86:4, 86:8, 88:19, 88:24 ending [1] - 75:3 Endowment [1] - 50:5 ends [2] - 32:13, 59:1 enforced [1] - 59:9 enforcement [14] - 25:9, 25:10, 35:3, 35:4, 35:5, 35:13, 39:4, 39:5, 40:6, 61:5, 73:25, 83:20, 85:11, 86:23 enforcing [4] - 31:15, 87:4, 89:19, 89:20 engage [2] - 55:24, 58:21 engaged [1] - 70:18 engagement [1] - 91:20 England [1] - 66:21 enjoin [2] - 48:6, 79:14 enjoined [1] - 85:5 enjoining [3] - 56:14, 83:19, 86:23 Ensure [2] - 21:12, 21:14 ensure [10] - 5:16, 6:6, 10:3, 21:3, 29:18, 41:24, 50:3, 54:6, 54:8, 73:9 entire [5] - 20:8, 20:23, 37:19, 57:22, 87:14 entirely [4] - 8:10, 23:1, 68:18, 84:22 entities [4] - 32:24, 36:7, 56:5, 75:15 entitled [5] - 5:7, 6:1, 56:21, 87:19, 92:20 entity [5] - 8:24, 15:22, 60:9, 76:4, 89:23 enumerable [2] - 39:9, 42:12 envision [1] -</p>	<p>16:18 EO [15] - 30:19, 31:16, 32:12, 32:16, 35:12, 36:17, 38:15, 42:4, 42:16, 42:19, 48:18, 48:24, 52:16, 53:9, 74:13 EOs [6] - 36:14, 39:8, 40:3, 46:11, 51:7, 51:20 EPA [1] - 23:16 equal [11] - 8:6, 9:5, 52:22, 55:13, 56:19, 65:21, 65:25, 66:5, 71:18, 72:20, 84:12 equally [1] - 84:10 equitable [1] - 13:14 equities [3] - 8:20, 86:19, 86:25 eradicating [1] - 5:12 erase [1] - 60:21 erases [1] - 60:21 escape [1] - 10:18 especially [7] - 23:13, 23:20, 25:11, 29:4, 30:19, 43:24, 76:16 Espinosa [1] - 89:13 ESQUIRE [6] - 1:12, 1:14, 1:17, 1:20, 1:22, 1:23 essence [1] - 16:5 essentially [27] - 4:25, 5:12, 7:11, 7:12, 7:20, 8:6, 13:19, 19:22, 24:20, 29:15, 32:12, 36:25, 37:19, 40:21, 45:23, 46:10, 47:1, 52:3, 52:17, 63:12, 67:19, 69:20, 71:12, 73:16, 78:12, 81:18, 84:18 establish [3] - 8:14, 8:15, 85:5 established [2] - 87:8, 87:18</p>	<p>et [4] - 1:3, 1:5, 2:4, 2:5 Europe [1] - 63:1 Evac [1] - 85:12 evade [1] - 11:10 evading [1] - 32:14 event [2] - 71:10, 71:24 events [1] - 32:20 everywhere [2] - 37:20, 92:1 evidence [8] - 18:13, 18:19, 18:22, 24:13, 57:23, 58:2, 58:6, 65:3 exact [3] - 28:13, 35:12, 35:21 exactly [4] - 35:20, 37:12, 51:11, 51:12 example [10] - 22:21, 22:24, 23:14, 25:6, 48:14, 48:22, 49:25, 68:10, 69:14, 70:22 examples [2] - 38:17, 38:23 except [4] - 17:12, 29:24, 37:15, 63:8 excess [1] - 7:18 exclusively [1] - 31:21 excuse [2] - 77:4, 86:17 executed [1] - 16:8 executive [9] - 13:16, 28:9, 29:2, 29:4, 43:3, 48:24, 52:18, 60:15, 87:12 Executive [53] - 5:6, 5:23, 5:25, 6:12, 6:20, 8:3, 8:5, 10:15, 11:4, 11:10, 11:17, 11:19, 12:5, 13:6, 15:13, 18:11, 18:13, 19:16, 19:22, 20:8, 23:16, 24:14, 24:18, 24:20, 28:7, 28:8, 29:6, 34:25, 36:22, 42:23, 43:2,</p>
---	--	---	---	--	--

43:3, 43:22, 44:8, 48:1, 48:2, 54:10, 56:13, 60:2, 66:19, 67:7, 83:21, 84:14, 85:3, 85:5, 86:24, 87:12, 88:19, 89:2, 89:20, 89:21, 90:2, 90:9 exercising [1] - 3:14 exhibition [1] - 50:6 exist [1] - 62:16 existing [1] - 50:20 exists [1] - 62:16 expand [1] - 82:16 experience [1] - 58:9 expert [2] - 51:23, 58:2 expires [1] - 82:7 explain [4] - 25:17, 55:18, 75:1, 80:1 explaining [1] - 46:10 explains [2] - 66:12, 90:24 explicit [1] - 53:11 exploration [1] - 61:5 explore [8] - 28:20, 45:5, 53:16, 53:23, 54:3, 54:4, 62:11, 67:20 exploring [2] - 43:22, 53:9 express [1] - 16:15 extend [1] - 90:25 extended [2] - 82:7, 82:10 extent [9] - 6:24, 13:10, 24:10, 24:17, 34:10, 49:19, 71:7, 73:23, 77:24 external [1] - 67:18 extraordinary [3] - 79:17, 79:20, 79:22 extreme [1] - 72:23	extremely [1] - 72:18 Extremism [1] - 5:8 F face [2] - 42:10, 85:4 facial [12] - 30:24, 31:23, 32:7, 33:3, 34:25, 36:21, 38:21, 39:10, 51:15, 51:17, 66:3, 81:5 facially [2] - 11:9, 25:7 facilities [1] - 38:17 fact [19] - 13:25, 18:2, 18:9, 18:18, 18:24, 22:5, 27:5, 27:8, 32:16, 39:9, 46:17, 59:6, 63:16, 74:23, 75:11, 77:25, 84:20, 86:14, 89:22 facto [2] - 26:8, 77:2 factor [1] - 73:10 factored [2] - 57:8, 91:1 factors [10] - 8:14, 8:25, 55:15, 59:9, 63:23, 72:20, 79:2, 79:3, 83:19, 85:15 facts [5] - 29:9, 35:6, 43:16, 46:3, 74:4 fair [2] - 15:24, 32:8 fairly [1] - 11:16 fall [3] - 9:13, 51:20, 81:5 false [1] - 60:20 familiar [1] - 40:22 Families [1] - 86:6 fantastic [1] - 3:15 far [5] - 18:10, 27:7, 37:3, 60:5, 65:22 FARBER [2] - 1:22, 2:22	Farber [1] - 2:23 fatal [1] - 66:4 fault [1] - 39:15 favor [3] - 83:19, 86:20, 86:25 favorite [1] - 18:17 favours [3] - 8:21, 87:9, 87:10 fear [4] - 11:23, 26:3, 26:7, 39:5 February [3] - 90:12, 90:17, 92:22 FEBRUARY [1] - 1:7 fed [1] - 42:14 federal [34] - 6:5, 6:7, 6:15, 6:21, 10:2, 10:4, 16:23, 21:14, 22:3, 22:18, 27:1, 28:25, 29:16, 29:18, 30:14, 31:16, 33:7, 33:18, 35:7, 35:8, 39:9, 43:12, 45:24, 50:1, 51:21, 51:22, 53:12, 61:8, 75:15, 84:1, 84:14, 87:15, 89:22, 90:7 Federal [3] - 5:9, 5:13, 41:21 FEDERAL [1] - 92:25 feelings [2] - 4:5, 4:6 fell [2] - 26:22, 39:11 few [1] - 41:9 fight [1] - 36:8 figure [6] - 33:11, 43:17, 57:18, 69:17, 81:6 file [5] - 20:17, 36:4, 82:21, 90:11, 90:16 filed [1] - 7:9 filing [1] - 82:2 fill [1] - 86:3 filming [1] - 3:20 Final [1] - 12:7 final [3] - 12:12, 24:20, 85:9 finally [3] - 4:24, 8:5, 86:19 financial [2] -	53:13, 61:8 fine [5] - 3:22, 3:25, 4:11, 76:6, 91:14 Fink [1] - 89:11 fire [1] - 35:21 first [16] - 3:4, 8:15, 12:23, 15:15, 21:25, 41:10, 57:12, 60:7, 64:17, 67:17, 73:1, 73:2, 77:17, 77:21, 83:6, 83:22 First [1] - 3:15 flag [4] - 30:17, 31:1, 49:15, 50:24 flagged [1] - 27:23 flagging [1] - 31:13 flatly [1] - 42:8 flights [1] - 40:19 flooding [1] - 3:12 Floor [4] - 1:13, 1:15, 1:18, 1:23 floor's [1] - 53:5 flush [1] - 52:18 fly [3] - 40:21, 40:24, 81:17 flying [1] - 75:22 focus [3] - 38:9, 38:23, 84:19 focused [1] - 31:21 fodder [2] - 35:3, 73:25 folks [1] - 3:11 follow [10] - 14:12, 16:5, 20:17, 22:7, 29:15, 41:16, 53:4, 65:6, 77:20, 77:21 follow-along [2] - 77:20, 77:21 follow-up [1] - 14:12 followed [1] - 7:9 following [3] - 10:10, 20:21, 91:21 Folwell [1] - 84:8 FOR [1] - 1:1 force [2] - 32:11, 64:18 forced [1] - 86:7 forego [1] - 69:10	foregoing [1] - 92:19 foremost [1] - 3:4 foreseeable [1] - 56:9 forget [1] - 27:17 form [1] - 59:4 format [3] - 32:21, 64:12, 69:5 format [1] - 92:20 forth [6] - 37:14, 45:7, 56:2, 57:25, 59:18, 60:15 forward [1] - 40:6 Foundation [1] - 89:14 four [4] - 8:14, 43:23, 46:6, 83:19 fours [1] - 57:13 Fourth [13] - 11:7, 24:7, 24:23, 45:9, 55:15, 70:23, 77:4, 78:10, 85:12, 85:19, 86:11, 87:7 fourth [1] - 8:22 fraction [1] - 47:20 Francisco [5] - 1:18, 18:8, 24:7, 47:5, 78:3 frankly [1] - 79:1 free [2] - 4:7, 4:18 freer [1] - 50:17 freeze [2] - 28:6, 33:22 freezes [1] - 43:25 frequently [1] - 18:10 fresh [1] - 47:9 friend [5] - 28:3, 35:2, 39:3, 42:14, 79:10 friend's [5] - 30:18, 31:21, 32:11, 33:15, 64:19 friends [5] - 36:20, 47:23, 48:10, 68:18, 71:13 front [2] - 3:14, 65:25 frowning [1] - 44:13 full [3] - 48:6, 48:20	fully [4] - 22:17, 58:22, 85:9, 90:24 function [1] - 7:19 fund [2] - 22:1, 49:3 Fund [1] - 1:15 fundamental [6] - 30:16, 31:13, 31:25, 32:7, 52:19, 66:23 fundamentally [3] - 19:1, 40:7, 43:18 funded [1] - 12:10 funding [38] - 6:21, 15:25, 16:3, 16:5, 17:7, 17:25, 20:23, 22:16, 26:19, 26:21, 28:6, 30:14, 33:10, 33:12, 33:22, 34:7, 35:2, 37:20, 39:18, 41:4, 41:8, 42:6, 49:7, 50:9, 53:13, 54:17, 60:8, 67:8, 74:8, 84:1, 84:15, 87:16, 88:5, 88:6, 88:23, 89:6, 89:22 funds [30] - 5:13, 5:17, 6:19, 7:6, 12:4, 15:21, 16:12, 16:20, 16:23, 16:24, 20:21, 21:4, 21:13, 22:3, 22:17, 27:1, 29:16, 31:16, 37:1, 41:22, 41:24, 45:4, 45:6, 50:2, 50:4, 75:15, 76:4, 90:7, 90:9 future [3] - 34:20, 63:13, 63:17 G gather [1] - 43:16 gears [1] - 68:3 Gender [9] - 5:7, 5:9, 5:13, 5:18, 14:20, 21:12, 50:1, 60:12, 90:5 gender [62] - 5:12,
--	---	---	--	--	--

<p>5:14, 5:15, 5:17, 6:17, 6:18, 6:22, 7:6, 7:11, 10:4, 10:19, 12:10, 15:7, 15:23, 16:19, 21:4, 21:13, 22:1, 22:11, 27:1, 29:17, 29:22, 31:4, 31:17, 34:16, 38:19, 41:22, 41:24, 45:6, 49:3, 50:2, 50:4, 54:1, 55:4, 55:9, 56:16, 58:7, 59:2, 60:3, 60:10, 60:19, 61:6, 63:10, 67:8, 68:9, 70:24, 71:20, 73:15, 75:16, 75:17, 76:5, 78:18, 83:21, 84:8, 84:12, 84:15, 84:24, 85:2, 86:4, 88:18, 89:24</p> <p>gender- affirming [39] - 6:17, 7:6, 7:11, 10:4, 10:19, 15:7, 15:23, 16:19, 22:11, 27:1, 29:22, 31:4, 34:16, 38:19, 49:3, 54:1, 55:9, 56:16, 59:2, 60:3, 60:10, 61:6, 63:10, 67:8, 68:9, 71:20, 73:15, 75:16, 75:17, 76:5, 83:21, 84:8, 84:12, 84:15, 84:24, 85:2, 86:4, 89:24</p> <p>general [7] - 11:20, 28:8, 29:8, 39:19, 47:7, 50:17, 62:12</p> <p>generally [4] - 4:16, 5:9, 6:2, 9:19</p> <p>generals [1] - 77:13</p> <p>Ginsberg [1] - 52:1</p>	<p>gist [2] - 37:2, 37:4</p> <p>given [3] - 27:6, 55:19, 84:6</p> <p>GLMA [4] - 76:19, 88:11, 88:21, 88:25</p> <p>Gloucester [2] - 55:5, 84:7</p> <p>goal [8] - 28:9, 43:22, 44:6, 45:20, 52:17, 53:10, 72:21, 73:9</p> <p>goals [5] - 18:11, 29:1, 37:13, 45:1, 59:6</p> <p>gonna [2] - 32:7, 46:25</p> <p>GONZALEZ [14] - 1:14, 2:12, 53:6, 53:19, 55:21, 57:10, 57:20, 58:11, 58:13, 58:17, 59:11, 60:1, 61:12, 62:1</p> <p>Gonzalez [3] - 2:10, 2:13, 9:4</p> <p>GONZALEZ-PAGAN [14] - 1:14, 2:12, 53:6, 53:19, 55:21, 57:10, 57:20, 58:11, 58:13, 58:17, 59:11, 60:1, 61:12, 62:1</p> <p>Gonzalez-Pagan [3] - 2:10, 2:13, 9:4</p> <p>Googling [1] - 3:8</p> <p>government [13] - 7:6, 8:24, 9:7, 13:12, 26:2, 38:13, 41:1, 41:2, 50:8, 50:17, 51:22, 52:12, 64:2</p> <p>Government [33] - 2:18, 3:17, 5:9, 10:25, 11:3, 12:10, 14:5, 14:10, 14:25, 15:18, 15:24, 16:16, 19:19, 20:24, 21:16, 23:8, 23:15, 25:3, 25:21, 26:18, 30:21,</p>	<p>48:25, 50:5, 56:25, 58:21, 60:22, 71:10, 76:15, 80:5, 84:20, 86:22, 87:2, 91:3</p> <p>Government's [6] - 14:10, 47:8, 59:12, 69:22, 82:21, 84:11</p> <p>government's [2] - 26:1, 26:3</p> <p>governmental [5] - 32:19, 46:6, 65:3, 66:13, 66:15</p> <p>governments [2] - 66:12, 66:16</p> <p>Governor [1] - 10:15</p> <p>grab [1] - 31:9</p> <p>grant [32] - 5:16, 12:3, 15:16, 15:18, 17:5, 17:9, 21:3, 21:12, 30:20, 31:18, 33:6, 33:7, 34:7, 34:18, 35:9, 35:10, 39:3, 39:7, 41:23, 41:24, 42:12, 48:25, 50:3, 50:4, 53:14, 69:9, 69:10, 70:15, 75:20, 88:22</p> <p>granted [4] - 8:19, 87:20, 88:14, 89:9</p> <p>grantee [4] - 5:16, 21:3, 41:23, 50:3</p> <p>granting [1] - 13:14</p> <p>grants [31] - 6:7, 6:15, 10:4, 13:12, 14:19, 15:15, 15:17, 15:21, 16:17, 16:21, 21:15, 28:25, 29:7, 29:19, 38:6, 38:8, 38:18, 39:9, 40:5, 40:8, 42:10, 43:11, 43:12, 43:14, 44:25, 49:19, 50:20, 54:7, 75:14, 90:7</p>	<p>granularity [1] - 39:17</p> <p>grappled [1] - 63:25</p> <p>Graver [3] - 2:19, 27:21, 62:2</p> <p>GRAVER [89] - 1:20, 2:19, 27:22, 27:25, 28:17, 28:20, 30:1, 30:15, 31:5, 31:9, 31:12, 32:3, 32:6, 32:9, 32:11, 33:13, 34:3, 34:9, 34:22, 35:16, 36:5, 37:4, 37:10, 38:3, 39:21, 40:10, 40:17, 40:22, 41:9, 42:3, 42:9, 43:5, 43:7, 43:10, 44:4, 44:14, 44:24, 45:14, 46:19, 47:16, 48:20, 48:23, 49:4, 49:15, 49:23, 50:11, 50:15, 51:4, 52:11, 52:21, 52:24, 62:5, 62:17, 62:20, 63:24, 64:7, 64:9, 64:16, 65:12, 65:14, 65:17, 66:2, 66:22, 67:3, 67:11, 67:23, 67:25, 68:17, 68:22, 68:24, 69:9, 69:19, 70:4, 71:2, 71:6, 72:3, 72:25, 73:21, 74:24, 75:8, 78:20, 79:7, 79:9, 79:21, 80:9, 81:2, 81:16, 91:12, 91:18</p> <p>great [1] - 49:9</p> <p>green [1] - 47:1</p> <p>Gregory [1] - 66:12</p> <p>Grimm [2] - 55:5, 84:7</p> <p>ground [6] - 3:18, 29:10, 32:23, 33:2, 62:24,</p>	<p>63:5</p> <p>grounding [1] - 71:8</p> <p>group [1] - 57:24</p> <p>guess [6] - 12:14, 33:20, 37:24, 43:19, 73:9, 73:18</p> <p>guidance [3] - 36:7, 37:12, 73:23</p> <p>gun [1] - 25:15</p> <p>gut [1] - 72:12</p> <p>gut-wrenching [1] - 72:12</p> <p>guys [1] - 33:20</p>	<p>H</p> <p>halt [2] - 12:4, 73:12</p> <p>halting [1] - 11:21</p> <p>hand [3] - 27:18, 50:18, 51:8</p> <p>handful [1] - 48:7</p> <p>handle [2] - 9:8, 51:24</p> <p>handling [2] - 9:3, 9:4</p> <p>hands [1] - 55:3</p> <p>haphazardly [1] - 7:13</p> <p>happy [3] - 13:4, 54:23, 75:10</p> <p>hard [11] - 3:8, 30:11, 45:17, 45:20, 54:18, 62:13, 63:5, 70:4, 72:19, 81:5, 81:16</p> <p>harder [1] - 63:14</p> <p>hardship [1] - 90:21</p> <p>harm [14] - 8:18, 47:11, 56:12, 58:5, 85:4, 85:5, 85:6, 85:8, 85:15, 85:17, 85:20, 86:12, 87:12, 87:13</p> <p>harmed [2] - 25:15, 87:3</p> <p>harms [3] - 56:7, 86:21, 86:22</p> <p>harp [1] - 45:16</p> <p>harping [1] - 71:9</p> <p>harps [1] - 53:22</p> <p>HARRY [1] - 1:20</p> <p>Harry [1] - 2:19</p> <p>Harvard [1] - 29:5</p>	<p>havoc [3] - 54:11, 54:12, 92:2</p> <p>Hawaii [1] - 62:8</p> <p>HB10075 [1] - 18:5</p> <p>HB1276 [1] - 18:6</p> <p>head [2] - 4:6, 25:16</p> <p>Health [5] - 7:2, 8:1, 89:11, 89:12, 89:13</p> <p>health [6] - 53:12, 54:14, 79:5, 86:13, 88:21, 89:23</p> <p>Healthcare [1] - 60:11</p> <p>healthcare [9] - 53:25, 54:21, 61:17, 72:12, 85:21, 89:4, 89:23</p> <p>hear [2] - 31:2, 78:15</p> <p>heard [1] - 73:19</p> <p>hearing [3] - 2:6, 26:18, 37:9</p> <p>HEARING [1] - 1:9</p> <p>heavy [1] - 80:18</p> <p>heightened [1] - 75:1</p> <p>held [2] - 85:19, 92:20</p> <p>help [1] - 4:21</p> <p>helpful [2] - 27:25, 82:25</p> <p>helps [1] - 66:5</p> <p>hereby [2] - 90:19, 92:19</p> <p>hero [1] - 83:8</p> <p>HHS [5] - 13:11, 24:12, 74:15, 88:24, 89:15</p> <p>hi [2] - 2:19, 2:25</p> <p>HIAS [17] - 11:8, 24:6, 24:8, 24:16, 24:17, 45:8, 45:11, 45:14, 45:17, 45:22, 46:4, 46:8, 46:20, 51:4, 51:9</p> <p>high [3] - 38:10, 71:24, 85:21</p> <p>higher [3] - 61:2, 70:12, 72:9</p> <p>himself [1] - 56:10</p> <p>hind [1] - 64:23</p>
--	---	--	--	---	---	---

<p>hoc [1] - 81:6</p> <p>hold [3] - 22:16, 58:1, 73:4</p> <p>holding [1] - 25:15</p> <p>holds [1] - 45:19</p> <p>honest [1] - 81:10</p> <p>Honor [44] - 2:8, 2:12, 2:15, 2:19, 2:22, 9:20, 10:1, 11:13, 12:23, 13:4, 14:2, 16:7, 17:12, 18:16, 20:1, 21:25, 27:3, 27:19, 33:13, 36:5, 36:16, 41:13, 44:24, 49:4, 49:20, 53:6, 53:7, 53:21, 54:23, 55:21, 57:11, 58:11, 59:19, 60:13, 60:18, 61:4, 61:19, 62:1, 64:21, 67:3, 75:13, 82:5, 91:16, 91:18</p> <p>HONORABLE [1] - 1:10</p> <p>hope [1] - 11:15</p> <p>hormone [1] - 68:11</p> <p>hormones [1] - 73:16</p> <p>horribly [1] - 72:16</p> <p>horse [2] - 47:17, 64:21</p> <p>hospital [6] - 20:22, 21:1, 22:3, 22:7, 22:11, 89:5</p> <p>Hospital [3] - 10:8, 10:21, 10:22</p> <p>hospital's [1] - 25:16</p> <p>Hospitals [1] - 10:11</p> <p>hospitals [22] - 6:16, 8:4, 10:13, 10:16, 11:2, 11:22, 21:22, 25:13, 26:25, 27:6, 27:7, 27:9, 29:23, 35:25, 46:15, 54:12, 55:24, 68:6, 69:23, 70:2,</p>	<p>86:15, 87:14</p> <p>host [2] - 39:13, 72:9</p> <p>hostage [1] - 22:16</p> <p>hotly [1] - 72:1</p> <p>hours [1] - 10:8</p> <p>house [1] - 35:19</p> <p>HRSA [9] - 7:3, 12:1, 12:19, 14:11, 14:18, 21:9, 30:2, 54:17, 88:23</p> <p>huge [2] - 50:23, 65:2</p> <p>human [1] - 58:8</p> <p>Human [1] - 89:11</p> <p>Humanities [1] - 50:6</p> <p>HURSON [1] - 1:10</p> <p>Hyde [2] - 16:22, 17:7</p> <p>hyper [1] - 70:6</p> <p>hypothetical [4] - 29:13, 42:16, 44:19, 44:25</p> <p>hysterectomies [1] - 68:10</p>	<p>12:10, 21:4, 21:13, 22:1, 29:17, 31:17, 34:16, 41:22, 41:25, 45:6, 50:2, 50:4</p> <p>ignore [1] - 32:9</p> <p>ignores [1] - 44:23</p> <p>ignoring [1] - 30:6</p> <p>Il [5] - 17:18, 43:20, 52:2, 84:5</p> <p>illegal [1] - 42:8</p> <p>Imagine [1] - 28:25</p> <p>imagine [8] - 32:19, 32:21, 42:4, 44:25, 46:11, 46:14, 62:23, 70:17</p> <p>immediacy [1] - 41:11</p> <p>immediate [14] - 10:6, 10:24, 14:8, 15:1, 26:14, 30:4, 42:1, 42:2, 42:3, 42:4, 58:24, 61:16, 73:11, 91:24</p> <p>immediately [24] - 7:3, 7:4, 10:16, 11:24, 12:4, 12:11, 20:11, 28:15, 28:19, 28:20, 29:17, 30:12, 30:14, 34:1, 34:4, 41:15, 41:18, 42:6, 45:1, 45:4, 54:9, 57:10, 59:1, 72:5</p> <p>Immediately [2] - 6:6, 10:2</p> <p>immigrants [2] - 25:24, 26:4</p> <p>imminent [1] - 85:7</p> <p>impact [2] - 12:17, 77:14</p> <p>impacted [1] - 7:14</p> <p>implement [6] - 6:23, 7:24, 11:12, 20:2, 43:17, 90:4</p> <p>implementation [3] - 48:2, 50:13, 83:20</p>	<p>implemented [6] - 7:4, 11:5, 39:12, 45:13, 46:24, 86:15</p> <p>implementing [5] - 28:9, 31:15, 71:11, 89:19, 89:20</p> <p>implicate [1] - 55:16</p> <p>implicit [1] - 21:21</p> <p>implied [1] - 16:15</p> <p>implying [1] - 21:5</p> <p>importance [1] - 89:3</p> <p>important [11] - 9:14, 11:18, 12:2, 13:24, 25:23, 50:22, 66:10, 67:12, 70:10, 78:21, 92:3</p> <p>importantly [1] - 30:13</p> <p>imported [1] - 76:7</p> <p>importing [2] - 64:23, 67:4</p> <p>impose [2] - 19:11, 42:15</p> <p>imposing [3] - 16:16, 19:12, 90:20</p> <p>imposition [1] - 24:24</p> <p>impossible [2] - 21:1, 35:11</p> <p>improvisation [1] - 54:1</p> <p>IN [1] - 1:1</p> <p>in-line [1] - 26:22</p> <p>INA [1] - 51:12</p> <p>inappropriate [1] - 78:10</p> <p>Inc [3] - 1:3, 1:15, 2:4</p> <p>include [1] - 78:6</p> <p>included [1] - 59:20</p> <p>includes [3] - 17:5, 65:22, 88:21</p> <p>including [2] - 5:19, 90:13</p> <p>inconsistent [1] - 13:7</p> <p>incorrect [1] -</p>	<p>26:4</p> <p>incredibly [1] - 16:25</p> <p>indicates [1] - 59:15</p> <p>indicating [1] - 4:11</p> <p>individual [3] - 12:25, 81:1, 85:22</p> <p>individuals [3] - 80:1, 80:2, 84:8</p> <p>ineffective [1] - 66:13</p> <p>inexplicable [3] - 62:8, 62:22, 63:6</p> <p>inform [1] - 74:14</p> <p>information [1] - 81:14</p> <p>initial [3] - 14:18, 74:21, 87:2</p> <p>initiate [2] - 16:10, 26:21</p> <p>initiated [1] - 84:20</p> <p>initiating [1] - 12:3</p> <p>initiatives [2] - 30:22, 50:18</p> <p>inject [1] - 57:20</p> <p>injunction [23] - 8:22, 14:23, 15:1, 15:2, 67:4, 74:18, 76:11, 76:14, 76:17, 76:20, 76:24, 77:2, 77:21, 78:4, 78:11, 80:16, 86:20, 87:21, 87:23, 89:1, 90:17, 90:20, 91:2</p> <p>injunctions [2] - 77:5, 77:20</p> <p>injunctive [2] - 59:22, 88:13</p> <p>injured [1] - 88:16</p> <p>injury [1] - 85:12</p> <p>innovations [1] - 54:15</p> <p>inquired [1] - 9:7</p> <p>inserted [1] - 17:14</p> <p>inside [1] - 4:6</p> <p>instance [10] - 38:6, 38:11, 41:2, 46:1, 47:10, 48:1, 48:7, 59:24,</p>	<p>70:20</p> <p>instances [4] - 35:1, 36:14, 36:16, 48:7</p> <p>instead [2] - 6:23, 28:13</p> <p>instituted [1] - 57:13</p> <p>Institutes [1] - 89:13</p> <p>institution [7] - 6:21, 7:13, 38:18, 54:7, 70:17</p> <p>institution's [1] - 21:14</p> <p>institutional [1] - 80:6</p> <p>institutions [19] - 6:6, 6:16, 7:5, 8:4, 10:3, 29:18, 38:8, 38:25, 39:2, 60:23, 69:1, 70:21, 79:25, 80:3, 80:20, 84:15, 88:6, 88:7, 88:22</p> <p>instruct [3] - 10:2, 90:3, 90:8</p> <p>instructed [1] - 10:16</p> <p>instructing [2] - 22:22, 44:21</p> <p>instruction [2] - 53:22, 68:19</p> <p>instructs [1] - 6:23</p> <p>insurance [1] - 55:12</p> <p>intend [4] - 53:1, 82:21, 83:15, 91:8</p> <p>intended [9] - 10:23, 26:13, 26:16, 30:9, 30:12, 30:13, 54:17, 61:17, 72:6</p> <p>intending [1] - 91:11</p> <p>intent [4] - 43:23, 46:21, 46:23, 47:8</p> <p>intention [4] - 53:3, 75:13, 91:4, 91:10</p> <p>intentional [1] - 41:13</p> <p>interest [4] - 8:22,</p>
---	---	--	--	---	---

66:13, 86:19, 87:8 interested [2] - 23:24, 78:17 interests [3] - 59:18, 85:1, 86:25 interfering [1] - 24:12 intermediary [1] - 40:13 intermediate [4] - 56:21, 57:8, 59:10, 84:9 internal [1] - 67:18 internal/external [2] - 68:2, 71:15 internally [1] - 78:23 interpreted [1] - 78:2 intervention [1] - 18:24 intimidated [2] - 4:18, 4:21 intricacies [1] - 59:17 intuition [3] - 34:23, 69:19, 79:11 inure [1] - 88:14 inverting [1] - 48:5 investigating [1] - 15:8 involve [2] - 39:9, 65:1 Iraq [2] - 25:6, 78:9 irreparable [9] - 8:18, 85:4, 85:5, 85:8, 85:11, 85:15, 85:17, 85:20, 86:21 Island [1] - 14:24 issuance [2] - 60:2, 87:3 issue [36] - 3:23, 16:13, 23:14, 25:18, 26:23, 28:2, 29:15, 30:10, 31:22, 32:15, 33:22, 35:7, 35:14, 36:12, 36:18, 36:20, 40:13, 40:23, 47:13, 47:21, 50:25, 51:11, 55:13,	56:20, 58:25, 63:21, 75:5, 77:20, 78:11, 80:8, 81:25, 83:13, 83:15, 83:24, 90:23, 91:8 issued [10] - 5:6, 5:25, 10:1, 11:20, 12:1, 28:23, 47:20, 76:13, 89:8 Issues [2] - 9:21, 9:24 issues [6] - 4:17, 9:9, 35:4, 47:9, 77:11, 83:11 issuing [2] - 13:12, 87:1 item [1] - 17:24 itself [4] - 11:8, 30:22, 55:8, 60:18	justice [6] - 29:1, 43:11, 44:19, 45:1, 77:9, 84:10 Justiciability [2] - 9:22, 9:25 justiciability [1] - 47:15 justiciable [1] - 39:1 justification [2] - 66:16, 86:10 justifications [2] - 57:23, 57:25 justify [1] - 59:12	69:21, 73:21, 74:5, 79:17 King [3] - 40:16, 40:19, 41:2 knocking [1] - 39:11	33:7, 33:19, 35:8, 43:14, 51:22 Laws [1] - 6:10 lawsuit [3] - 20:5, 76:3 lawyers [2] - 4:4, 4:20 layer [1] - 14:4 lead [1] - 53:10 Leaders [1] - 87:5 leads [1] - 26:17 learned [1] - 7:8 least [17] - 17:25, 20:24, 21:22, 23:10, 23:12, 29:23, 31:14, 33:14, 34:11, 37:2, 45:18, 62:11, 64:23, 66:7, 74:12, 84:17, 91:9 leave [2] - 4:10, 91:21 leaving [1] - 92:3 left [2] - 11:21, 66:16 legal [9] - 29:3, 31:24, 38:7, 39:10, 42:11, 42:17, 50:9, 64:14, 79:3 Legal [1] - 1:15 legally [1] - 26:4 legislation [2] - 17:4, 18:10 legislative [2] - 7:19, 18:19 Legislative [1] - 22:24 legislature [1] - 19:4 legislatures [1] - 65:2 legitimacy [1] - 19:16 legitimate [2] - 59:4, 66:13 lengthy [1] - 65:1 less [4] - 44:3, 44:4, 78:20, 79:19 letter [1] - 12:20 level [5] - 28:2, 29:9, 38:10, 70:13, 71:24 level-set [1] - 28:2 Liberties [1] - 1:12 life [1] - 92:1	light [1] - 43:7 lighted [1] - 47:1 likelihood [2] - 83:22, 85:14 likely [6] - 8:15, 8:17, 9:10, 14:21, 15:4, 87:4 limitation [2] - 75:18, 78:18 limitations [2] - 50:23, 78:22 limited [2] - 16:24, 88:8 line [4] - 17:24, 26:22, 70:22, 82:20 lion [1] - 47:19 Lisa [1] - 44:12 list [1] - 54:3 listened [1] - 58:2 literally [2] - 36:2, 55:10 litigation [1] - 26:21 lives [1] - 87:13 LLP [1] - 1:17 localities [1] - 24:21 located [3] - 77:22, 77:25, 88:25 location [1] - 35:21 Loe [1] - 57:16 logic [2] - 70:11, 74:6 logistics [1] - 8:12 look [15] - 3:3, 16:14, 28:13, 30:9, 36:1, 44:22, 49:4, 51:9, 58:1, 66:18, 66:19, 73:10, 76:22, 80:24, 82:18 looked [1] - 58:2 looking [4] - 22:22, 40:15, 44:12, 71:9 looks [1] - 28:7 Loper [2] - 52:5, 52:13 Los [1] - 50:6 lose [7] - 21:5, 21:23, 39:18, 41:4, 47:22, 71:4, 87:15 loses [1] - 41:7
L					
L.A. [2] - 10:21, 10:22 labor [3] - 19:19, 42:21, 42:22 lack [2] - 59:14 Lambda [1] - 1:15 language [6] - 11:16, 41:15, 42:1, 49:10, 73:19, 75:25 laptops [1] - 5:1 large [1] - 50:25 larger [1] - 89:5 last [5] - 8:25, 14:15, 28:24, 47:16, 90:22 late [1] - 63:21 Laughter [1] - 4:23 Laura [1] - 2:15 LAURA [1] - 1:17 law [34] - 6:24, 8:23, 11:6, 11:12, 11:25, 13:20, 13:21, 16:5, 28:10, 28:11, 28:13, 29:2, 29:15, 33:16, 35:6, 39:7, 41:16, 42:7, 43:16, 44:7, 44:9, 45:2, 45:19, 46:4, 48:11, 48:12, 48:14, 51:25, 55:7, 62:12, 65:7, 69:4, 73:14, 78:2 lawful [6] - 22:21, 29:14, 36:15, 36:22, 36:24, 48:12 lawfully [1] - 66:17 Lawrence [1] - 57:16 laws [14] - 5:18, 9:6, 10:18, 17:19, 17:21, 19:3, 19:5, 23:10, 26:2,					
K					
Kadel [25] - 53:20, 54:23, 55:1, 55:3, 55:8, 56:20, 57:6, 58:22, 59:13, 61:9, 61:13, 65:16, 65:20, 66:1, 66:4, 66:11, 66:14, 66:16, 70:11, 74:6, 84:7, 84:10, 84:18, 84:23, 85:2 Kassandra [1] - 92:18 KASSANDRA [1] - 92:24 Kavanaugh [1] - 76:25 Kavanaugh's [1] - 76:22 keep [4] - 4:5, 38:21, 39:14, 70:5 keeps [1] - 41:11 kept [1] - 81:7 key [12] - 28:11, 28:17, 33:1, 33:20, 34:9, 36:9, 40:1, 40:3, 41:9, 45:16, 48:4, 71:8 keywords [1] - 54:8 kick [2] - 51:23, 52:18 kind [15] - 42:5, 43:12, 49:20, 51:6, 51:14, 55:18, 63:17, 64:23, 68:19, 68:25, 69:9,					
J					
January [2] - 5:6, 5:25 Jenner [2] - 1:17, 2:16 job [5] - 30:14, 49:9, 52:7, 54:25, 81:14 joint [1] - 90:16 joints [1] - 64:3 Jones [1] - 1:20 JOSHUA [1] - 1:12 Joshua [1] - 2:8 jot [1] - 33:16 Judge [6] - 52:1, 62:6, 66:11, 76:13, 76:22, 85:24 judgment [1] - 85:9 judicial [5] - 11:10, 32:14, 32:25, 46:8, 92:2 Judicial [1] - 92:21 juggling [1] - 29:21 jump [5] - 31:9, 31:19, 32:3, 40:13, 45:24 juris [1] - 84:10 Justice [2] - 76:22, 76:25					

<p>losing [2] - 56:6, 56:7</p> <p>lost [3] - 16:4, 86:2, 89:6</p> <p>Louisiana [1] - 1:21</p> <p>love [2] - 34:13, 67:21</p> <p>lower [2] - 13:16, 62:7</p> <p>lucid [1] - 55:25</p>	<p>matters [2] - 16:1, 26:12</p> <p>Matthew [1] - 89:14</p> <p>Mauj [1] - 61:13</p> <p>McPherson [1] - 92:18</p> <p>MCPHERSON [1] - 92:24</p> <p>McVey [1] - 85:12</p> <p>MD [1] - 1:24</p> <p>mean [25] - 14:11, 16:1, 21:18, 22:20, 24:17, 29:12, 29:24, 31:2, 34:16, 41:16, 45:16, 48:20, 48:23, 50:11, 50:21, 52:6, 55:1, 62:5, 65:10, 67:1, 68:1, 77:12, 79:1, 81:1, 82:9</p> <p>meaning [3] - 18:20, 74:15, 85:8</p> <p>meaningful [2] - 49:24, 80:12</p> <p>meaningfully [1] - 39:12</p> <p>means [6] - 13:15, 18:25, 22:10, 29:22, 36:21, 52:10</p> <p>meant [1] - 40:10</p> <p>measure [1] - 42:15</p> <p>measures [1] - 63:2</p> <p>meat [1] - 46:3</p> <p>Medicaid [2] - 20:15, 22:6</p> <p>Medical [1] - 18:7</p> <p>medical [45] - 6:15, 6:16, 6:17, 10:9, 15:23, 16:19, 19:4, 22:4, 24:13, 28:4, 30:25, 31:1, 31:20, 38:8, 38:16, 38:25, 39:2, 40:11, 49:18, 50:16, 50:21, 54:2, 54:6, 56:16, 57:5, 58:7, 60:3, 60:10, 61:7, 70:17, 75:16, 76:5, 79:24,</p>	<p>86:4, 86:7, 86:12, 87:14, 88:6, 88:7, 88:18, 88:22, 89:24</p> <p>medically [1] - 6:17</p> <p>Medicare [5] - 20:15, 22:6, 22:8, 22:10, 22:12</p> <p>medicine [2] - 30:20, 71:16</p> <p>meet [3] - 56:11, 79:22, 90:15</p> <p>meeting [1] - 72:12</p> <p>meetings [1] - 3:8</p> <p>meets [1] - 76:20</p> <p>member [2] - 13:1, 81:21</p> <p>members [12] - 31:24, 77:1, 77:3, 80:3, 80:15, 80:21, 81:20, 88:12, 88:15, 88:17, 88:24</p> <p>membership [7] - 77:1, 77:6, 79:3, 79:24, 80:6, 80:7, 80:8</p> <p>memo [2] - 14:21, 91:8</p> <p>Memoli [1] - 89:14</p> <p>memorandum [1] - 83:15</p> <p>mention [1] - 74:13</p> <p>mentioned [6] - 17:8, 22:5, 51:5, 64:9, 64:19, 79:10</p> <p>mentioning [2] - 39:4, 71:15</p> <p>merge [1] - 8:25</p> <p>merits [2] - 8:16, 83:23</p> <p>message [2] - 14:17, 41:3</p> <p>messages [2] - 30:21, 50:18</p> <p>messy [1] - 81:10</p> <p>met [1] - 83:18</p> <p>middle [3] - 59:5, 71:3, 72:15</p> <p>might [14] - 11:13, 12:14, 14:15, 21:9, 36:16, 37:16, 38:19,</p>	<p>40:3, 43:17, 48:8, 49:16, 62:3, 64:25, 82:18</p> <p>million [3] - 43:13, 46:11</p> <p>mind [2] - 52:17, 88:3</p> <p>minor [1] - 57:19</p> <p>minority [2] - 20:25, 54:13</p> <p>minors [8] - 7:11, 15:7, 16:20, 31:4, 56:24, 59:13, 64:3, 84:21</p> <p>Minors [1] - 18:6</p> <p>minutes [2] - 81:24, 82:24</p> <p>minutia [1] - 50:20</p> <p>misinterpreted [2] - 73:11, 73:18</p> <p>mismatch [1] - 75:1</p> <p>missed [2] - 18:2, 29:13</p> <p>missing [1] - 55:20</p> <p>Molissa [1] - 2:22</p> <p>MOLISSA [1] - 1:22</p> <p>moment [3] - 30:23, 32:9, 56:17</p> <p>Mona [1] - 44:12</p> <p>money [3] - 17:22, 38:13, 50:19</p> <p>month [1] - 50:7</p> <p>morning [3] - 2:8, 2:12, 22:22</p> <p>most [2] - 66:10, 92:1</p> <p>mostly [1] - 71:25</p> <p>motion [5] - 7:1, 9:1, 87:20, 89:9</p> <p>motions [2] - 2:6, 76:15</p> <p>MOTIONS [1] - 1:9</p> <p>motivated [1] - 23:20</p> <p>move [4] - 9:12, 32:22, 49:12, 73:17</p> <p>moved [1] - 61:21</p> <p>must [6] - 12:4, 29:17, 85:6,</p>	<p>85:8, 86:20, 89:25</p> <p>Mutilation [2] - 6:2, 18:5</p> <p>mutilation [2] - 6:8, 29:20</p>	<p>needed [3] - 26:8, 56:17, 59:22</p> <p>needs [3] - 57:7, 82:6, 85:22</p> <p>never [2] - 9:7, 26:21</p> <p>New [5] - 1:13, 1:16, 10:13, 17:20, 24:6</p> <p>new [2] - 10:22, 38:18</p> <p>next [3] - 50:7, 74:19, 74:20</p> <p>nice [6] - 2:11, 2:14, 2:17, 2:21, 2:24, 3:1</p> <p>NICOLE [1] - 1:23</p> <p>Nicole [1] - 2:25</p> <p>night [3] - 3:7, 10:6, 82:3</p> <p>NIH [1] - 88:23</p> <p>Ninth [7] - 18:9, 40:15, 40:25, 47:5, 51:5, 61:14, 79:11</p> <p>NO [1] - 1:4</p> <p>nobody [2] - 37:15, 84:23</p> <p>non [2] - 61:9, 87:23</p> <p>non-</p> <p>discriminating [1] - 61:9</p> <p>non-parties [1] - 87:23</p> <p>nondiscretionary [1] - 33:22</p> <p>nondiscriminati [1] - 84:25</p> <p>none [3] - 27:11, 50:16, 73:17</p> <p>nonmembers [1] - 80:20</p> <p>nonparties [1] - 80:17</p> <p>normal [3] - 3:22, 3:25, 20:3</p> <p>NORTHERN [1] - 1:2</p> <p>note [6] - 14:10, 14:18, 18:17, 18:18, 87:17, 88:11</p> <p>noted [5] - 10:1, 17:12, 24:9, 85:10, 86:14</p> <p>notes [2] - 1:25, 5:1</p> <p>nothing [7] - 4:21, 13:25, 14:6,</p>	
N						
<p>main [2] - 51:6, 53:17</p> <p>maintain [2] - 4:8, 91:25</p> <p>maintains [1] - 87:17</p> <p>majority [3] - 57:21, 62:24</p> <p>Malpractice [1] - 18:7</p> <p>managing [1] - 23:9</p> <p>mandate [1] - 56:1</p> <p>manner [6] - 9:16, 45:5, 58:23, 59:8, 73:12, 86:14</p> <p>Market [1] - 1:18</p> <p>markets [1] - 32:23</p> <p>marshal [1] - 66:15</p> <p>marshalled [1] - 80:20</p> <p>Marshals [2] - 4:15, 4:19</p> <p>MARYLAND [1] - 1:1</p> <p>Maryland [4] - 1:8, 3:16, 10:18, 92:19</p> <p>massive [1] - 51:22</p> <p>material [1] - 23:8</p> <p>matter [19] - 2:3, 2:5, 16:6, 16:14, 26:6, 26:10, 33:19, 42:10, 42:17, 53:13, 53:14, 64:12, 69:12, 76:17, 77:23, 87:2, 92:20</p> <p>mattered [1] - 26:7</p>						

30:20, 33:17, 58:24, 71:15 notice [16] - 10:8, 12:1, 12:6, 12:21, 13:24, 14:18, 20:17, 34:1, 37:15, 37:19, 39:16, 90:1, 90:3, 90:14 noticed [2] - 24:23, 78:5 notices [3] - 10:25, 12:2, 13:12 noting [2] - 10:15, 61:20 notion [1] - 54:22 November [1] - 58:13 NSF [1] - 89:14 nukes [1] - 37:19 number [4] - 2:4, 18:5, 72:2, 72:10 nuts [2] - 36:2, 69:16 NY [2] - 1:13, 1:16	92:17, 92:25 officials [2] - 13:16, 32:19 often [3] - 42:22, 77:19, 81:12 old [1] - 63:19 olds [1] - 57:16 Omar [1] - 2:12 OMAR [1] - 1:14 OMB [4] - 11:20, 14:21, 29:17, 41:18 Omnibus [1] - 17:8 on-point [2] - 11:7, 24:2 once [2] - 9:14, 66:11 one [51] - 3:19, 4:5, 6:4, 7:17, 7:23, 8:13, 8:16, 8:23, 11:13, 12:16, 14:9, 14:21, 18:1, 18:17, 19:1, 19:19, 21:6, 21:24, 24:21, 30:15, 36:12, 39:11, 40:15, 40:18, 41:7, 44:19, 45:10, 46:1, 46:24, 48:7, 50:22, 51:7, 61:20, 61:22, 63:25, 64:25, 67:22, 69:16, 70:7, 71:15, 72:8, 77:8, 77:21, 79:2, 80:8, 81:6, 81:12, 82:21 one's [1] - 26:19 ones [3] - 24:3, 51:24, 61:21 ones' [1] - 60:19 open [5] - 4:11, 50:7, 66:16, 84:22, 90:7 opinion [8] - 25:1, 53:4, 62:7, 83:15, 85:24, 89:8, 90:23, 91:8 opportunity [2] - 20:4, 73:16 opposed [2] - 56:24, 57:19 opposite [2] - 19:10, 48:8 opposition [2] -	15:18, 62:14 options [2] - 53:23, 54:3 oral [2] - 65:23, 83:14 Order [37] - 5:7, 5:10, 5:13, 5:18, 6:1, 6:3, 6:12, 10:2, 10:15, 11:4, 11:19, 18:11, 18:14, 19:16, 19:22, 20:9, 24:14, 24:18, 28:7, 28:8, 29:6, 34:25, 36:22, 48:1, 48:2, 50:1, 56:13, 60:11, 60:12, 67:7, 83:21, 85:5, 89:20, 89:21, 90:6, 90:10 order [116] - 5:11, 5:15, 5:21, 6:5, 6:9, 7:1, 7:5, 8:11, 8:13, 9:16, 10:6, 10:18, 10:22, 10:23, 11:8, 11:11, 14:8, 16:8, 16:9, 20:2, 20:11, 20:12, 20:13, 21:2, 22:1, 22:2, 22:5, 22:7, 22:13, 22:21, 25:7, 26:12, 26:13, 28:12, 30:7, 31:10, 31:14, 32:2, 33:9, 33:14, 37:23, 41:12, 41:14, 41:20, 41:21, 43:8, 44:5, 44:18, 44:25, 46:7, 46:22, 46:24, 47:3, 47:9, 48:10, 48:13, 49:4, 49:17, 50:12, 50:13, 53:25, 55:16, 55:24, 55:25, 56:10, 56:14, 56:17, 56:23, 57:22, 58:23, 59:1, 59:4, 59:8, 60:5, 60:6, 60:14, 60:18, 60:25, 62:11, 62:14, 62:23, 63:7, 63:16,	64:24, 67:8, 67:13, 67:19, 67:25, 68:1, 70:25, 71:10, 71:23, 72:4, 75:3, 75:5, 76:8, 77:3, 78:6, 78:24, 83:15, 83:19, 83:25, 87:19, 87:25, 88:2, 89:9, 90:1, 90:13, 90:23, 91:7, 92:2 order's [1] - 22:14 ordered [7] - 23:15, 89:8, 89:10, 89:25, 90:11, 90:15, 90:18 ordering [1] - 11:23 orders [21] - 7:4, 7:23, 7:24, 13:8, 13:17, 14:1, 14:20, 21:22, 23:7, 23:23, 25:12, 28:2, 29:16, 30:8, 30:12, 30:13, 61:16, 66:18, 85:3, 87:12, 89:3 Orders [15] - 6:20, 8:3, 8:6, 11:17, 12:5, 13:6, 15:13, 42:23, 43:2, 60:2, 86:24, 87:12, 88:19, 89:2, 90:2 ordinance [1] - 40:20 organization [2] - 77:1, 77:7 organizational [1] - 88:12 organizations [1] - 76:19 original [1] - 24:3 ostensibly [1] - 13:25 otherwise [4] - 30:6, 54:13, 60:24, 89:21 ought [1] - 49:11 outbursts [1] - 4:2 outcome [2] - 72:22, 91:24 outset [1] - 53:2	outside [3] - 3:20, 4:7, 11:24 overall [1] - 44:16 overarching [1] - 64:16 overbroad [3] - 70:20, 75:12, 78:21 overlapping [2] - 43:14, 51:22 overlook [1] - 51:10 overnight [2] - 28:4, 28:12 overrule [1] - 19:8 overruled [1] - 58:10 oversight [1] - 25:4 own [10] - 7:10, 7:20, 8:2, 16:2, 16:20, 16:24, 17:13, 23:9, 38:13, 50:19	P	p.m [3] - 2:1, 83:5, 92:6 PAGAN [14] - 1:14, 2:12, 53:6, 53:19, 55:21, 57:10, 57:20, 58:11, 58:13, 58:17, 59:11, 60:1, 61:12, 62:1 Pagan [3] - 2:10, 2:13, 9:4 page [1] - 92:20 pages [2] - 17:9 pamphlets [1] - 23:8 Panchanathan [1] - 89:15 paper [1] - 3:2 papers [2] - 4:3, 72:11 paragraph [3] - 20:10, 20:12, 60:7 paragraphs [1] - 42:6 parallel [1] - 28:21 paraphrase [1] - 42:6 paraphrasing [3] - 28:23, 65:15, 68:5	Parenthood [1] - 85:23 parents [1] - 72:13 parse [1] - 21:6 part [17] - 25:23, 29:13, 36:9, 43:19, 48:21, 51:12, 63:25, 66:6, 66:10, 67:4, 70:4, 70:8, 78:24, 79:25, 80:3, 80:23, 81:2 participate [2] - 22:7, 80:21 participation [4] - 20:15, 22:6, 22:10, 89:18 particular [8] - 19:24, 21:17, 27:9, 39:2, 53:10, 54:17, 80:25, 83:20 particularly [10] - 50:24, 53:18, 53:19, 65:20, 72:17, 73:15, 76:21, 77:6, 78:1, 92:1 parties [12] - 25:15, 25:21, 35:13, 36:17, 56:10, 76:18, 79:15, 80:12, 80:17, 83:1, 87:23, 90:15 parts [5] - 54:19, 54:20, 67:13, 74:12, 74:13 party [6] - 8:25, 32:6, 80:11, 80:13, 81:4, 81:7 pass [3] - 18:4, 18:6, 18:7 passed [6] - 18:19, 18:20, 18:25, 19:3, 25:8, 40:20 past [3] - 29:6, 33:18, 49:18 patient [1] - 89:24 patients [6] - 6:17, 21:1, 54:15, 68:12, 86:8, 86:16 patterns [1] - 39:9 pause [3] - 11:20, 14:21, 66:7
---	---	--	---	---	----------	--	---

<p>paused [1] - 90:9</p> <p>payments [2] - 11:21, 11:23</p> <p>pending [2] - 2:3, 58:14</p> <p>penny [1] - 22:18</p> <p>people [23] - 3:11, 3:14, 3:24, 7:7, 10:5, 15:23, 18:4, 20:3, 20:16, 22:17, 27:2, 28:22, 39:23, 54:2, 54:21, 56:6, 56:16, 57:24, 60:23, 61:17, 64:19, 83:9, 89:6</p> <p>per [2] - 58:23, 69:2</p> <p>peradventure [1] - 61:23</p> <p>percent [1] - 33:15</p> <p>percentage [1] - 72:2</p> <p>perfect [1] - 43:7</p> <p>perfectly [1] - 45:22</p> <p>performing [2] - 38:8, 38:19</p> <p>perhaps [5] - 33:25, 69:23, 71:16, 84:19, 91:9</p> <p>permanently [1] - 12:11</p> <p>permits [1] - 5:22</p> <p>permitted [2] - 3:21, 6:24</p> <p>pernicious [1] - 25:12</p> <p>persist [1] - 88:7</p> <p>person [1] - 63:15</p> <p>personal [1] - 3:24</p> <p>persons [1] - 89:17</p> <p>perspective [2] - 69:22, 71:10</p> <p>persuasive [2] - 58:18, 79:23</p> <p>pertain [1] - 57:24</p> <p>pertaining [1] - 61:22</p> <p>pertains [5] - 23:11, 56:15, 60:2, 61:6, 83:21</p> <p>perverse [2] -</p>	<p>54:12, 54:22</p> <p>PFLAG [8] - 1:3, 2:4, 13:1, 76:19, 80:7, 88:11, 88:17, 88:24</p> <p>phase [1] - 49:18</p> <p>phone [2] - 10:11, 35:23</p> <p>phones [1] - 3:19</p> <p>phonetic [1] - 61:13</p> <p>PHSA [1] - 8:1</p> <p>PI [3] - 81:11, 82:2, 82:5</p> <p>pick [2] - 3:6, 22:23</p> <p>picture [1] - 29:9</p> <p>piece [13] - 12:9, 28:11, 28:17, 33:20, 40:4, 49:15, 50:23, 66:7, 68:2, 75:23, 79:10, 81:4</p> <p>piecemeal [1] - 88:3</p> <p>pieces [1] - 41:10</p> <p>pitting [2] - 20:25, 54:20</p> <p>place [2] - 15:15, 36:25</p> <p>places [2] - 64:13, 79:5</p> <p>placing [1] - 60:22</p> <p>plain [1] - 22:2</p> <p>plainly [1] - 11:9</p> <p>plaintiff [2] - 12:24, 85:20</p> <p>Plaintiff [3] - 38:3, 41:6, 85:6</p> <p>plaintiff's [1] - 85:22</p> <p>plaintiffs [3] - 65:2, 84:3, 86:13</p> <p>Plaintiffs [38] - 1:3, 1:11, 2:7, 2:9, 2:13, 2:16, 6:13, 7:2, 7:9, 7:10, 7:14, 7:15, 8:3, 8:13, 10:10, 35:22, 47:13, 52:9, 56:11, 64:14, 65:19, 70:25, 79:4, 80:25, 81:1, 81:18, 83:18, 83:23, 85:4, 85:13, 85:16,</p>	<p>85:25, 86:6, 87:18, 87:22, 88:12, 90:21, 91:15</p> <p>Plaintiffs' [3] - 7:17, 9:1, 89:8</p> <p>Planned [1] - 85:23</p> <p>play [5] - 35:8, 60:17, 64:3, 67:22, 84:14</p> <p>plays [1] - 67:24</p> <p>pleadings [1] - 6:14</p> <p>plenty [1] - 71:21</p> <p>plowed [1] - 25:2</p> <p>plus [1] - 49:13</p> <p>podium [1] - 9:18</p> <p>Pogue [2] - 10:7, 76:23</p> <p>point [60] - 11:7, 11:15, 15:12, 16:3, 18:1, 24:2, 27:10, 30:17, 30:18, 31:13, 31:19, 33:1, 33:11, 34:9, 34:18, 39:6, 40:1, 44:16, 45:16, 47:16, 48:4, 49:12, 49:22, 49:24, 50:12, 50:22, 51:4, 51:6, 52:16, 58:19, 59:21, 59:22, 60:6, 61:13, 62:3, 62:5, 62:6, 63:24, 64:1, 66:25, 67:12, 69:5, 70:7, 71:2, 71:4, 71:6, 71:8, 72:13, 72:25, 73:5, 73:21, 74:2, 74:3, 74:22, 75:23, 76:2, 79:21, 80:10, 85:25</p> <p>pointed [1] - 72:6</p> <p>pointing [2] - 11:4, 41:16</p> <p>points [4] - 30:15, 34:3, 56:25, 79:9</p> <p>police [1] - 43:3</p> <p>Police [1] - 87:6</p> <p>policies [3] - 15:8, 43:13, 46:4</p> <p>policy [26] - 6:24, 17:14, 28:8,</p>	<p>28:21, 29:8, 29:10, 32:22, 37:13, 43:22, 44:6, 44:20, 44:21, 45:20, 46:2, 51:8, 51:11, 52:3, 54:1, 62:12, 62:22, 63:5, 65:6, 65:7, 66:25, 67:20, 89:3</p> <p>political [1] - 59:16</p> <p>population [8] - 54:13, 61:2, 62:16, 72:8, 72:18, 72:24, 89:4, 89:5</p> <p>populations [1] - 54:18</p> <p>portions [4] - 22:21, 76:7, 85:2, 89:2</p> <p>portrayed [1] - 41:13</p> <p>portraying [1] - 28:3</p> <p>pose [1] - 90:21</p> <p>posit [2] - 60:4, 61:4</p> <p>position [5] - 30:10, 34:21, 55:20, 59:16, 71:3</p> <p>possible [3] - 13:2, 54:24, 69:2</p> <p>posture [2] - 66:4, 74:1</p> <p>potential [1] - 15:8</p> <p>potentially [3] - 50:10, 53:1, 89:5</p> <p>poverty [1] - 72:9</p> <p>power [6] - 13:9, 17:3, 17:16, 17:19, 17:21, 24:22</p> <p>Power [2] - 23:11, 23:13</p> <p>powers [4] - 9:4, 19:15, 85:18, 87:11</p> <p>Powers [4] - 9:12, 17:3, 37:3, 37:4</p> <p>practice [1] - 21:15</p> <p>practices [1] -</p>	<p>74:16</p> <p>pre [8] - 35:3, 35:4, 35:5, 35:13, 39:4, 40:6, 52:5, 73:25</p> <p>pre-enforcement [7] - 35:3, 35:4, 35:5, 35:13, 39:4, 40:6, 73:25</p> <p>pre-Loper [1] - 52:5</p> <p>precedent [6] - 11:7, 53:20, 55:22, 58:19, 77:5, 77:24</p> <p>precisely [1] - 11:25</p> <p>precluded [1] - 16:16</p> <p>predictable [2] - 25:20, 26:13</p> <p>preference [2] - 6:24, 82:15</p> <p>preferences [3] - 5:16, 41:24, 50:3</p> <p>preliminary [5] - 59:22, 86:20, 90:16, 90:20, 91:2</p> <p>prerogative [1] - 52:2</p> <p>Prescribes [1] - 5:22</p> <p>prescriptions [1] - 86:3</p> <p>presence [1] - 31:8</p> <p>present [5] - 8:10, 62:21, 66:10, 79:15, 79:16</p> <p>presentation [3] - 32:6, 81:4, 81:7</p> <p>presentment [1] - 7:20</p> <p>preserve [1] - 59:23</p> <p>preserves [1] - 88:9</p> <p>President [41] - 5:6, 5:21, 5:22, 5:25, 6:10, 6:11, 6:14, 7:18, 10:1, 11:23, 17:5, 17:10, 17:13, 17:14, 17:16, 17:19, 17:20, 17:21, 19:12,</p>	<p>19:24, 19:25, 22:18, 28:10, 28:25, 32:21, 33:17, 36:25, 37:13, 42:22, 43:1, 43:21, 44:7, 46:2, 47:25, 51:19, 56:10, 56:13, 72:6, 75:24, 78:6, 78:11</p> <p>President's [10] - 6:23, 7:18, 11:1, 13:6, 13:8, 14:1, 15:9, 22:25, 26:15, 42:20</p> <p>press [6] - 4:24, 4:25, 11:1, 26:15, 30:7, 31:24</p> <p>pressing [5] - 31:22, 32:16, 36:20, 38:4, 49:20</p> <p>presumably [2] - 20:15, 63:10</p> <p>pretty [5] - 18:13, 35:18, 56:20, 64:17, 66:24</p> <p>prevail [3] - 61:20, 61:21, 88:13</p> <p>preventing [1] - 88:5</p> <p>prevents [1] - 87:3</p> <p>previous [1] - 14:17</p> <p>primarily [2] - 18:23, 84:21</p> <p>Principal [1] - 89:12</p> <p>principle [1] - 88:3</p> <p>principles [1] - 81:7</p> <p>priorities [1] - 17:14</p> <p>priority [2] - 54:1, 82:5</p> <p>privacy [1] - 26:2</p> <p>private [3] - 22:17, 35:13, 36:7</p> <p>problem [7] - 13:24, 23:5, 32:15, 42:18, 66:14, 70:1, 81:8</p> <p>problematic [1] -</p>
--	---	--	--	--	--

<p>22:23</p> <p>procedure [1] - 21:17</p> <p>procedures [6] - 16:11, 20:18, 20:21, 28:4, 30:25, 38:9</p> <p>proceed [1] - 12:25</p> <p>proceedings [3] - 4:25, 92:6, 92:20</p> <p>proceeds [1] - 60:21</p> <p>process [9] - 12:3, 15:7, 19:7, 19:9, 19:11, 19:13, 20:16, 72:12, 75:3</p> <p>processes [1] - 20:3</p> <p>Professional [1] - 92:18</p> <p>professional [1] - 89:23</p> <p>professionals [1] - 88:21</p> <p>program [3] - 22:8, 22:12, 53:12</p> <p>programs [7] - 12:10, 15:22, 30:20, 33:6, 39:19, 42:12, 86:4</p> <p>prohibit [1] - 88:19</p> <p>prohibiting [2] - 26:2, 26:5</p> <p>prohibits [2] - 16:23, 24:12</p> <p>promote [11] - 5:14, 5:17, 21:4, 21:13, 29:17, 31:17, 41:22, 41:24, 45:5, 50:2, 50:4</p> <p>promotes [1] - 6:22</p> <p>promoting [1] - 34:15</p> <p>prompt [1] - 26:14</p> <p>promulgated [2] - 5:21, 6:11</p> <p>prong [1] - 85:20</p> <p>pronounced [1] - 34:15</p> <p>pronouncement [1] - 44:20</p> <p>proof [1] - 26:15</p>	<p>proper [2] - 20:21, 34:24</p> <p>properly [1] - 59:18</p> <p>proposals [1] - 18:19</p> <p>propose [2] - 19:13, 22:25</p> <p>proposed [11] - 18:4, 31:14, 35:1, 44:17, 50:13, 60:5, 60:6, 67:13, 68:1, 76:8, 78:5</p> <p>proposing [2] - 23:4, 90:16</p> <p>proposition [1] - 45:11</p> <p>prospect [1] - 85:10</p> <p>protect [1] - 59:7</p> <p>protected [1] - 56:22</p> <p>Protecting [4] - 6:1, 6:3, 18:6, 48:24</p> <p>protecting [4] - 30:19, 71:25, 87:9, 87:10</p> <p>protection [13] - 8:6, 9:5, 15:3, 52:23, 55:14, 56:19, 65:21, 65:25, 66:5, 71:19, 72:20, 72:21, 84:12</p> <p>Protection [1] - 61:18</p> <p>provide [26] - 6:16, 16:19, 16:23, 22:3, 22:16, 22:17, 27:1, 28:1, 37:21, 39:17, 41:4, 53:3, 54:16, 68:7, 68:10, 68:16, 69:25, 70:2, 70:21, 70:22, 75:15, 76:18, 84:15, 87:15, 87:22, 89:25</p> <p>provided [3] - 16:2, 68:11, 86:5</p> <p>providers [8] - 40:5, 40:8, 40:11, 69:1, 72:12, 86:2, 86:7, 88:1</p>	<p>provides [8] - 6:22, 15:2, 15:22, 22:11, 54:7, 54:14, 76:5, 89:23</p> <p>providing [8] - 10:9, 15:6, 26:20, 30:4, 34:16, 60:10, 81:14, 90:13</p> <p>provision [5] - 19:4, 19:20, 43:2, 56:15, 70:13</p> <p>provisions [13] - 8:2, 20:13, 23:6, 23:19, 24:13, 30:24, 31:6, 31:7, 36:23, 36:24, 47:21, 83:25, 86:24</p> <p>prudence [1] - 84:11</p> <p>puberty [3] - 63:11, 68:12, 73:15</p> <p>Public [1] - 8:1</p> <p>public [5] - 8:22, 14:12, 86:19, 86:25, 87:8</p> <p>published [1] - 7:4</p> <p>purport [2] - 6:21, 13:8</p> <p>purpose [3] - 6:18, 24:14, 68:13</p> <p>purposes [7] - 2:6, 15:17, 16:21, 62:21, 66:11, 67:6, 73:6</p> <p>pursuant [2] - 15:14, 92:19</p> <p>pursue [1] - 80:2</p> <p>pushed [1] - 72:24</p> <p>pushing [2] - 51:15, 71:12</p> <p>put [8] - 30:22, 35:10, 46:2, 47:23, 48:16, 50:11, 60:14, 72:23</p> <p>puts [3] - 19:22, 64:21, 86:15</p> <p>putting [3] - 21:1, 28:10, 34:4</p>	<p>Q</p> <p>qualifying [1] - 49:11</p> <p>quality [1] - 85:21</p> <p>quasi [1] - 56:22</p> <p>quasi-protected [1] - 56:22</p> <p>questioning [1] - 6:4</p> <p>questions [8] - 9:19, 14:3, 23:22, 27:11, 27:23, 47:12, 60:20, 77:10</p> <p>quick [1] - 31:10</p> <p>quite [1] - 70:14</p> <p>quo [4] - 59:23, 59:24, 87:18, 88:9</p> <p>quote [21] - 6:5, 6:9, 6:13, 6:25, 10:2, 12:7, 30:8, 46:21, 85:21, 85:22, 85:25, 86:5, 86:6, 86:8, 86:12, 87:8, 88:16, 88:17, 88:20, 88:22, 88:24</p> <p>quote/unquote [1] - 18:12</p> <p>quoting [2] - 21:9, 21:11</p>	<p>reaches [5] - 30:25, 31:23, 49:17, 49:18, 57:15</p> <p>reaching [3] - 31:4, 60:5, 81:22</p> <p>reaction [1] - 4:1</p> <p>reactions [1] - 4:2</p> <p>read [13] - 33:13, 33:14, 35:11, 40:13, 45:18, 45:21, 52:17, 67:15, 67:19, 73:1, 74:3, 74:12, 78:23</p> <p>reading [20] - 22:4, 22:13, 22:14, 23:8, 33:14, 43:8, 44:15, 49:16, 52:19, 55:1, 62:11, 62:15, 64:24, 66:23, 66:24, 67:13, 68:15, 69:17, 70:9, 74:5</p> <p>readings [1] - 75:2</p> <p>ready [1] - 46:7</p> <p>real [7] - 32:17, 32:20, 33:2, 36:14, 38:24, 44:19, 59:3</p> <p>real-world [2] - 32:17, 33:2</p> <p>reality [4] - 11:3, 30:6, 44:23, 64:10</p> <p>realize [1] - 43:12</p> <p>really [18] - 3:9, 7:16, 12:16, 23:24, 26:10, 33:25, 51:21, 59:3, 59:6, 70:4, 71:22, 72:11, 72:18, 80:5, 81:15, 87:10, 91:20, 91:25</p> <p>reason [9] - 5:2, 8:9, 15:4, 20:10, 38:20, 42:11, 43:19, 71:9, 84:19</p> <p>reasonably [2] - 22:15, 88:14</p> <p>reasoning [1] - 86:11</p> <p>reasons [6] - 13:13, 14:19,</p>	<p>32:6, 32:7, 89:7, 90:24</p> <p>receipt [1] - 61:8</p> <p>receive [3] - 26:25, 36:7, 88:17</p> <p>received [3] - 10:11, 35:23, 72:5</p> <p>receives [1] - 53:12</p> <p>receiving [12] - 6:7, 7:6, 10:3, 21:14, 21:22, 22:3, 29:18, 54:7, 59:5, 68:13, 79:5, 88:22</p> <p>receptive [1] - 37:14</p> <p>recess [1] - 83:4</p> <p>RECESS [1] - 83:5</p> <p>recipient [4] - 34:7, 34:8, 34:18, 35:10</p> <p>recipients [5] - 35:5, 40:9, 40:10, 59:7, 73:15</p> <p>recognized [1] - 52:1</p> <p>record [11] - 2:7, 14:7, 26:24, 65:6, 66:14, 67:5, 70:5, 74:2, 74:10, 81:12, 86:9</p> <p>recording [1] - 3:20</p> <p>records [3] - 10:11, 65:1, 67:21</p> <p>rectified [1] - 85:9</p> <p>redressability [1] - 25:22</p> <p>redressable [1] - 26:11</p> <p>redressed [1] - 56:14</p> <p>refer [2] - 5:9, 38:11</p> <p>reference [1] - 18:9</p> <p>referenced [1] - 6:22</p> <p>references [2] - 41:17, 65:24</p> <p>referencing [2] - 44:18, 76:8</p>
--	---	---	---	--	---

<p>reflect [1] - 45:23 reflects [1] - 59:8 refugee [1] - 24:19 refusal [1] - 84:11 refused [1] - 86:3 regarding [1] - 19:19 regardless [9] - 3:9, 6:18, 11:17, 45:20, 59:1, 59:5, 59:11, 64:5, 73:12 regards [2] - 60:5, 60:6 regimes [2] - 38:7, 39:10 Registered [1] - 92:18 regretting [1] - 71:25 regular [1] - 16:11 regulate [1] - 66:17 regulated [5] - 32:24, 36:6, 39:24, 56:4 regulations [3] - 5:23, 15:8, 92:21 regulator [2] - 39:22, 39:24 reinstate [1] - 90:4 rejected [2] - 18:10, 54:22 relate [4] - 7:22, 30:19, 66:3, 70:13 related [3] - 6:19, 80:4, 84:21 relates [4] - 17:2, 45:17, 45:21, 70:7 relating [1] - 65:4 relationship [1] - 16:20 release [4] - 11:1, 26:15, 30:7, 90:8 relevant [2] - 35:8, 89:1 relief [24] - 8:18, 13:14, 32:7, 34:25, 35:13, 39:11, 48:10, 49:23, 50:8, 50:22, 59:23, 67:12, 70:8, 71:7, 75:12,</p>	<p>76:18, 76:20, 79:16, 80:2, 80:11, 80:13, 81:21, 87:22, 88:13 Relief [3] - 9:22, 27:14, 30:18 religiously [1] - 69:24 relitigate [1] - 84:18 relitigating [1] - 79:10 remaining [1] - 12:9 remedies [1] - 20:6 remedy [2] - 81:5, 88:14 remember [3] - 24:19, 24:22, 73:13 remiss [1] - 87:17 remnant [1] - 12:9 remote [1] - 85:7 removal [1] - 23:7 removed [1] - 10:24 removes [1] - 33:23 repeatedly [1] - 18:3 reply [4] - 7:8, 10:8, 24:9, 57:25 report [3] - 74:19, 90:12, 90:16 reported [1] - 92:20 reporter [1] - 83:9 REPORTER [2] - 92:17, 92:25 Reporter [1] - 92:18 represented [1] - 7:15 request [1] - 70:20 requested [2] - 9:2, 75:12 require [1] - 8:3 required [1] - 59:10 requirement [3] - 12:13, 90:18, 90:20 requirements [1] - 56:12 requiring [1] - 88:9</p>	<p>rescind [2] - 17:21, 34:13 rescinded [7] - 14:11, 14:22, 34:10, 37:25, 40:1, 40:2, 48:17 rescinding [1] - 34:12 rescission [1] - 15:5 research [13] - 6:7, 6:15, 10:4, 21:15, 29:19, 38:12, 52:3, 54:7, 54:14, 70:14, 70:18, 71:17, 74:16 resettlement [1] - 24:19 reside [1] - 87:22 Resources [2] - 7:2, 89:12 respect [9] - 47:19, 56:19, 64:2, 71:18, 72:20, 79:2, 79:15, 90:7, 91:25 respond [3] - 9:11, 51:3, 62:4 responded [1] - 10:14 responding [2] - 16:8, 46:15 responds [1] - 11:3 response [10] - 6:25, 9:8, 26:1, 33:10, 47:2, 57:24, 58:24, 64:1, 68:6, 68:25 responses [1] - 57:10 responsibility [1] - 18:23 rest [1] - 82:22 restaurant [1] - 69:15 Restoring [1] - 5:8 restrained [1] - 89:18 restraining [7] - 7:1, 8:11, 8:13, 56:17, 83:18, 87:19, 90:1 restriction [3] - 69:21, 74:7,</p>	<p>74:8 restrictions [4] - 19:11, 19:12, 62:25, 87:4 result [5] - 7:10, 15:9, 25:13, 25:20, 88:4 retraining [1] - 89:9 return [1] - 74:16 reveal [1] - 60:16 reveals [1] - 37:5 review [6] - 11:10, 13:23, 32:14, 32:25, 46:8, 47:2 reviewability [1] - 45:25 reviewed [1] - 48:3 Rhode [1] - 14:24 rid [1] - 29:7 rightfully [1] - 31:8 rights [2] - 3:15, 87:9 ripe [4] - 12:7, 25:10, 26:11, 56:5 ripeness [1] - 36:8 rise [1] - 83:4 risk [6] - 54:13, 58:8, 60:23, 60:24, 72:23, 86:16 road [1] - 38:11 robust [1] - 91:9 roll [1] - 73:8 rolled [1] - 73:14 room [4] - 4:24, 35:19, 49:16, 58:20 rooted [1] - 42:23 RPR [1] - 92:24 rule [4] - 53:1, 53:3, 81:25, 88:1 rulemaking [4] - 16:10, 20:16, 20:17, 37:9 rules [4] - 3:19, 22:6, 38:10, 91:21 ruling [2] - 83:14, 87:11 run [3] - 23:10, 45:15, 79:24 running [1] - 33:8 runs [3] - 28:14,</p>	<p>30:19, 84:12 rural [1] - 54:19</p>	<p>77:14, 79:12 second [9] - 3:3, 3:22, 7:22, 8:17, 9:12, 22:2, 71:23, 80:19, 85:4 secretaries [1] - 78:7 secretary [1] - 74:15 section [37] - 5:12, 5:19, 5:22, 21:11, 21:13, 24:11, 31:16, 41:20, 42:20, 50:1, 50:14, 53:7, 53:11, 53:17, 53:24, 53:25, 54:5, 56:15, 60:3, 60:6, 60:11, 61:5, 61:6, 65:20, 68:4, 74:17, 83:20, 89:19, 89:21, 90:5, 90:6 sector [1] - 36:7 security [3] - 4:19, 90:18, 90:20 see [29] - 2:11, 2:14, 2:17, 2:21, 2:24, 3:1, 11:13, 15:25, 16:15, 23:5, 23:20, 27:11, 29:24, 34:19, 36:6, 42:12, 42:13, 42:19, 42:20, 48:17, 49:22, 51:12, 55:16, 62:24, 69:23, 70:10, 75:23, 79:25, 85:1 seeing [1] - 41:25 seek [1] - 35:13 seeking [4] - 15:1, 20:8, 48:10, 78:4 seem [6] - 24:23, 25:1, 37:8, 52:8, 55:16, 79:5 segment [2] - 89:4, 89:5 segues [1] - 14:2 seizing [1] - 49:10 Seldin [1] - 88:16 send [4] - 37:15, 37:18, 37:19 senders [2] -</p>
--	--	---	---	---	---

39:15, 39:16 sending [1] - 7:5 sense [4] - 43:7, 43:20, 47:2, 80:14 sent [3] - 10:8, 10:25, 48:16 sentence [1] - 26:12 separate [3] - 60:13, 61:15, 75:19 separately [1] - 61:2 separation [4] - 9:4, 19:15, 85:18, 87:11 Separation [6] - 9:11, 17:3, 23:11, 23:13, 37:2, 37:4 separations [1] - 10:10 serious [1] - 49:5 servants [1] - 89:16 serve [3] - 60:24, 69:14, 69:16 Services [4] - 7:3, 8:1, 89:11, 89:12 set [8] - 28:2, 37:13, 50:7, 56:2, 57:25, 59:18, 60:15, 84:13 sets [1] - 53:25 setting [1] - 63:6 settled [3] - 13:15, 27:21, 49:20 several [3] - 14:19, 65:10, 65:23 sex [11] - 8:8, 53:15, 54:24, 55:5, 55:10, 55:15, 56:23, 60:19, 63:11, 63:12, 68:14 shall [12] - 5:13, 5:15, 21:3, 31:17, 41:22, 41:23, 50:2, 50:3, 90:3, 90:8, 90:11, 90:15 share [1] - 47:19 shifting [1] - 48:4 shoehorning [1] - 34:23	shorter [1] - 82:18 show [2] - 8:17, 8:20 showing [2] - 26:10, 85:6 shown [3] - 17:6, 26:7, 85:13 shut [1] - 72:14 shutdown [1] - 86:3 side [8] - 3:9, 16:1, 19:6, 30:23, 34:5, 47:15, 53:9, 53:21 sides [2] - 71:21, 81:13 sight [1] - 47:22 signed [3] - 17:4, 17:10, 77:8 significant [5] - 16:22, 80:7, 86:21, 87:15, 88:4 silly [2] - 55:18, 63:17 similar [3] - 36:6, 64:17, 82:18 simply [6] - 11:16, 15:7, 15:22, 40:25, 44:7, 88:9 simulcast [1] - 4:25 single [1] - 48:11 sit [1] - 75:6 situation [3] - 28:21, 35:22, 65:21 Skrmetti [9] - 19:2, 57:2, 57:14, 62:7, 65:22, 72:1, 73:2, 73:13, 74:4 slightly [2] - 57:14, 84:13 smiling [1] - 44:13 smoke [1] - 35:18 Snyder [1] - 61:14 socioeconomic [1] - 54:19 solo [1] - 77:8 solutions [2] - 44:9, 65:6 someone [1] - 22:13 sometime [1] - 14:14	somewhat [1] - 71:3 soon [3] - 13:2, 88:18, 90:23 sorry [2] - 27:13, 40:10 sort [34] - 7:12, 9:3, 11:9, 16:4, 21:17, 23:24, 24:2, 24:3, 24:18, 24:22, 28:21, 38:12, 43:3, 43:11, 43:19, 43:20, 43:25, 44:20, 45:24, 47:1, 47:11, 58:7, 63:17, 64:25, 66:23, 70:20, 71:2, 71:6, 72:19, 73:8, 73:24, 74:25, 75:1 sorts [2] - 20:9, 49:18 sounds [3] - 12:12, 47:8, 63:17 South [2] - 1:23, 85:23 space [9] - 25:1, 31:20, 38:16, 50:21, 50:22, 62:25, 66:17, 72:16 spaces [1] - 39:13 speaking [1] - 41:20 speaks [3] - 21:2, 25:5, 39:19 specific [13] - 15:16, 15:17, 15:25, 16:6, 24:17, 25:9, 39:19, 65:3, 66:14, 73:23, 80:11, 80:13, 83:25 specifically [5] - 7:23, 41:21, 46:20, 53:8, 76:25 specificity [1] - 43:6 spectators [1] - 83:1 spectrum [3] - 45:24, 46:1, 51:7 speculative [1] -	85:7 speech [1] - 32:22 spend [1] - 17:22 spent [1] - 37:1 spite [1] - 61:1 splays [1] - 64:24 split [1] - 9:2 splitting [1] - 9:7 spoken [1] - 53:9 sponsored [1] - 50:6 spot [1] - 33:15 spread [1] - 7:12 staff [2] - 4:15, 10:9 stake [1] - 3:23 stand [1] - 45:11 standalone [1] - 70:14 standard [7] - 11:16, 23:12, 39:3, 42:11, 47:11, 62:21, 83:18 standards [1] - 39:5 standing [4] - 61:16, 80:2, 80:6, 81:19 stands [1] - 83:4 Stanley [1] - 56:12 start [12] - 9:17, 28:1, 28:20, 31:1, 53:7, 53:8, 62:3, 66:8, 71:11, 72:14, 78:23, 83:17 started [3] - 61:19, 86:17, 86:18 starting [3] - 2:7, 28:22, 75:3 state [6] - 10:18, 19:4, 57:18, 76:23, 77:1, 86:6 state-wide [1] - 76:23 statement [2] - 11:4, 11:10 STATES [1] - 1:1 states [5] - 24:21, 57:13, 57:18, 62:25, 87:23 States [7] - 2:20, 5:19, 5:20, 6:10, 78:6, 92:18, 92:21 statistically [1] -	72:8 status [8] - 14:15, 59:23, 59:24, 87:18, 88:9, 90:11, 90:13, 90:16 statute [12] - 13:9, 15:14, 15:18, 16:11, 16:12, 16:14, 18:20, 26:5, 42:24, 46:25, 52:13, 66:8 statutes [12] - 7:25, 15:16, 17:5, 17:12, 19:24, 25:8, 42:15, 43:25, 70:8, 70:9, 70:11, 70:15 statutory [2] - 9:5, 17:14 stay [1] - 76:15 stayed [1] - 76:23 stays [1] - 15:1 stenographica l [1] - 92:20 stenographica l y-reported [1] - 92:20 stenotype [1] - 1:25 step [4] - 19:8, 36:12, 40:14, 64:25 steps [19] - 6:6, 10:3, 28:16, 28:17, 29:18, 34:4, 34:7, 41:18, 41:19, 44:6, 45:18, 45:21, 48:13, 54:6, 63:4, 65:5, 74:20, 90:4 still [7] - 13:1, 16:24, 26:5, 58:14, 58:17, 80:12, 82:21 stop [20] - 13:16, 21:23, 26:20, 27:8, 28:12, 30:3, 30:12, 30:14, 34:8, 34:15, 34:16, 34:19, 35:25, 36:17, 39:17, 50:9, 63:10, 67:8, 72:5 stopped [1] - 30:9 Stopping [1] -	18:5 stopping [4] - 35:23, 35:24, 59:5 straight [1] - 87:5 stream [2] - 16:6, 53:13 streams [3] - 15:25, 33:12, 39:18 Street [4] - 1:13, 1:15, 1:18, 1:23 strengthen [1] - 52:8 stretch [1] - 47:15 stretches [2] - 31:20, 38:15 strike [1] - 48:6 strikes [2] - 26:17, 64:25 strings [2] - 19:22, 83:25 stripped [1] - 6:15 strong [4] - 18:13, 30:5, 83:22, 85:14 strongly [1] - 86:25 Struggle [1] - 87:6 struggling [4] - 33:25, 49:7, 49:8, 62:18 stuck [1] - 65:18 studies [3] - 26:7, 66:20, 71:21 studying [2] - 34:17, 59:14 stuff [3] - 32:24, 33:21, 75:20 sub [1] - 54:11 sub-agencies [1] - 54:11 subagencies [2] - 88:24, 89:15 subject [3] - 84:9, 84:25, 88:1 submissions [1] - 83:7 subordinates [1] - 52:18 subset [3] - 38:6, 40:3, 54:21 subsetting [1] - 40:2 subsidize [4] - 22:19, 30:22, 50:18, 69:22 subsidizing [1] - 38:11
--	---	---	---	---	--

substance [1] - 23:3 succeed [2] - 8:16, 83:23 succeeded [1] - 18:15 success [1] - 85:14 successors [1] - 89:16 sudden [1] - 86:12 suffer [4] - 8:17, 85:6, 86:7, 90:19 suffering [2] - 47:13, 85:17 suffers [1] - 85:20 sufficient [3] - 32:18, 36:8, 66:15 sufficiently [1] - 46:7 suggest [1] - 81:17 suicide [1] - 72:9 suing [1] - 88:12 suit [1] - 7:9 Suite [1] - 1:18 suited [1] - 85:22 suits [2] - 36:17, 75:19 supplies [1] - 85:11 support [3] - 14:7, 86:5, 86:9 supported [1] - 22:4 suppose [2] - 46:16, 47:18 supposed [9] - 7:21, 18:14, 39:20, 51:23, 79:16, 79:22, 80:18, 88:14 Supreme [4] - 19:2, 26:5, 29:4, 57:3 surgery [2] - 22:11, 22:17 Surgical [1] - 6:2 surgical [3] - 6:8, 29:19, 37:18 survive [1] - 61:7 Sutton's [1] - 62:6 sweeping [1] - 16:25 sweeps [1] - 38:22 switch [1] - 52:24	swoop [1] - 39:12 system [2] - 19:14, 24:20 <hr/> T <hr/> tailor [3] - 32:1, 81:21 tailored [4] - 59:18, 63:7, 65:3, 71:12 talks [2] - 25:19, 77:19 tangible [1] - 86:12 targeted [2] - 25:25, 47:24 targets [2] - 63:16, 63:17 technical [1] - 69:11 technically [2] - 69:6, 69:7 temporarily [4] - 14:22, 20:23, 56:14, 86:23 temporary [8] - 6:25, 8:11, 8:13, 56:17, 83:18, 87:19, 89:9, 90:1 ten [1] - 42:6 tend [1] - 9:13 Tennessee [1] - 74:7 term [1] - 45:18 terminated [3] - 12:11, 14:19, 60:9 terminating [1] - 13:12 termination [2] - 10:25, 14:18 terms [15] - 16:2, 17:2, 21:2, 26:10, 33:6, 35:8, 36:21, 39:7, 39:19, 42:12, 49:11, 59:3, 63:3, 67:17, 76:11 terrorizing [2] - 25:13, 25:14 test [1] - 57:8 testimony [2] - 8:10, 58:3 tests [1] - 85:1 text [6] - 11:8, 12:2, 22:2, 22:13, 28:11,	46:21 texts [1] - 34:13 THE [149] - 1:1, 1:1, 1:10, 2:3, 2:11, 2:14, 2:17, 2:21, 2:24, 3:1, 4:24, 9:23, 11:11, 11:15, 12:14, 12:22, 13:19, 14:4, 15:5, 15:24, 17:1, 17:23, 19:17, 21:2, 21:11, 21:21, 22:20, 23:6, 23:22, 24:5, 24:16, 26:17, 27:4, 27:10, 27:15, 27:17, 27:20, 27:24, 28:15, 28:19, 29:12, 30:2, 31:2, 31:6, 31:11, 32:1, 32:5, 32:8, 32:10, 33:9, 33:24, 34:6, 34:12, 35:15, 35:17, 36:23, 37:7, 37:11, 39:14, 40:8, 40:12, 40:18, 40:23, 41:14, 42:8, 42:19, 43:6, 43:9, 44:3, 44:11, 44:15, 45:3, 46:13, 46:20, 48:19, 48:22, 49:2, 49:5, 49:22, 49:25, 50:14, 50:24, 52:5, 52:20, 52:22, 52:25, 53:18, 55:1, 56:19, 57:17, 58:10, 58:12, 58:15, 58:20, 59:24, 61:11, 61:25, 62:2, 62:14, 62:18, 63:8, 64:5, 64:8, 64:13, 65:10, 65:13, 65:15, 65:18, 66:18, 67:1, 67:6, 67:21, 67:24, 68:3, 68:20, 68:23, 69:7, 69:13, 69:23, 70:19, 71:5,	71:18, 72:4, 73:3, 74:21, 75:4, 75:9, 75:17, 75:21, 76:9, 77:12, 78:5, 78:12, 78:15, 78:25, 79:8, 79:19, 80:5, 80:24, 81:9, 81:23, 82:9, 82:13, 82:20, 83:4, 83:6, 91:14, 91:17, 91:19 theme [1] - 51:14 themselves [2] - 38:5, 74:18 theories [2] - 31:24, 61:20 therapy [1] - 68:11 thereabouts [1] - 14:16 they've [2] - 15:19, 20:20 thin [2] - 81:12, 81:13 thinking [6] - 35:18, 52:6, 63:3, 63:9, 71:7, 78:23 thinks [1] - 36:16 third [7] - 3:16, 7:22, 8:20, 25:14, 25:21, 56:9, 60:7 thoughts [1] - 91:11 threat [6] - 11:22, 20:19, 27:6, 27:8, 39:5, 87:12 threaten [1] - 87:13 threatens [1] - 37:20 three [2] - 7:16, 83:23 threshold [2] - 30:16, 30:17 Threshold [2] - 9:21, 9:24 throughout [1] - 88:25 throw [2] - 38:13, 50:19 thrust [1] - 74:5 THURSDAY [1] - 1:7 tie [1] - 55:3	tight [1] - 81:12 Title [1] - 5:19 title [1] - 33:16 today [17] - 3:10, 3:23, 3:24, 7:16, 8:9, 12:18, 38:2, 44:23, 59:22, 76:1, 77:15, 82:17, 83:12, 83:24, 84:18, 91:20, 92:4 today's [1] - 61:19 together [1] - 60:14 ton [1] - 42:21 took [2] - 24:20, 80:8 totally [5] - 31:8, 34:20, 37:14, 47:14, 69:16 touchstone [1] - 81:17 tough [1] - 74:11 touted [1] - 56:10 towards [6] - 28:14, 30:19, 33:8, 44:6, 47:24, 79:24 traceability [1] - 25:22 traceable [1] - 56:12 tract [1] - 3:5 traditional [1] - 73:24 trans [1] - 50:6 transcript [2] - 92:19, 92:20 transcription [1] - 1:25 Transgender [1] - 86:1 transgender [5] - 8:7, 56:21, 84:9, 87:13, 89:4 transition [3] - 6:18, 63:13, 72:1 Transportation [2] - 49:1, 49:3 traveled [1] - 10:18 treatment [9] - 6:22, 21:7, 31:1, 67:8, 70:13, 71:17, 73:12, 73:13, 88:18 treatments [6] - 49:7, 58:6, 66:13, 70:18,	86:16, 86:17 trial [2] - 58:2, 85:9 tried [3] - 10:20, 18:15, 27:22 TRO [18] - 20:8, 23:14, 23:21, 30:18, 30:23, 31:15, 59:22, 61:22, 75:14, 80:22, 81:9, 82:7, 87:1, 87:3, 87:17, 88:8, 90:25, 91:4 TROs [1] - 81:10 troubled [1] - 24:24 true [7] - 25:11, 42:25, 60:16, 64:6, 69:6, 69:7, 92:19 Trump [12] - 2:5, 5:6, 5:25, 6:14, 10:1, 18:8, 22:18, 25:6, 32:22, 33:17, 62:8, 78:9 TRUMP [1] - 1:5 trust [1] - 4:4 Truth [1] - 5:8 try [3] - 8:9, 82:24, 91:4 trying [11] - 21:17, 22:22, 39:22, 44:12, 51:6, 57:18, 57:20, 69:13, 69:17, 75:1, 91:10 Tuesday [1] - 82:3 turn [1] - 46:25 tweak [1] - 44:24 two [14] - 8:25, 18:21, 30:15, 30:24, 34:3, 47:21, 48:16, 48:21, 55:12, 57:10, 63:25, 72:25, 74:13, 78:16 type [5] - 39:2, 53:12, 56:5, 68:7, 68:8 types [1] - 78:17
					U <hr/> U.S. [4] - 3:16, 4:15, 4:19, 89:10 U.S.C. [2] - 5:22,

<p>92:19</p> <p>ultimately [2] - 53:11, 59:12</p> <p>ultra [3] - 7:17, 7:23, 14:2</p> <p>unassailable [1] - 85:16</p> <p>uncomfortable [3] - 4:14, 4:18, 4:21</p> <p>unconstitutional [3] - 19:6, 85:11, 87:5</p> <p>under [26] - 6:18, 7:7, 10:5, 12:10, 13:23, 15:23, 19:24, 23:12, 27:2, 36:3, 52:13, 54:2, 55:12, 56:16, 59:10, 59:13, 60:3, 61:12, 61:17, 61:18, 61:21, 72:20, 74:6, 89:24, 90:4, 90:7</p> <p>underline [1] - 20:8</p> <p>underscore [1] - 41:11</p> <p>understandable [1] - 11:22</p> <p>understood [2] - 18:23, 68:18</p> <p>undocumented [2] - 25:24, 26:4</p> <p>unemployment [1] - 72:10</p> <p>unfortunately [1] - 3:12</p> <p>unilateral [1] - 19:16</p> <p>unilaterally [1] - 6:14</p> <p>Union [1] - 1:12</p> <p>United [7] - 2:20, 5:19, 5:20, 6:10, 78:6, 92:18, 92:21</p> <p>UNITED [1] - 1:1</p> <p>universe [5] - 39:1, 39:23, 53:16, 61:4, 66:20</p> <p>unlawful [6] - 11:9, 13:16, 20:9, 44:7, 48:8, 69:2</p> <p>unless [1] - 14:2</p> <p>unpack [1] - 66:8</p>	<p>unsung [1] - 83:8</p> <p>up [15] - 3:6, 9:2, 9:8, 9:14, 14:12, 16:4, 25:1, 27:21, 35:10, 52:9, 57:14, 64:17, 65:6, 70:7, 82:17</p> <p>upended [1] - 24:18</p> <p>upside [1] - 46:25</p> <p>US [1] - 12:10</p> <p>uses [1] - 45:4</p> <p>usurping [1] - 7:19</p>	<p>virtue [1] - 35:4</p> <p>Visits [1] - 86:12</p> <p>voiced [1] - 55:19</p> <p>vs [1] - 1:4</p> <p>vulnerable [5] - 20:25, 54:13, 54:18, 72:18, 72:23</p>	<p>Whitman [1] - 77:19</p> <p>Whitman-Walker [1] - 77:19</p> <p>whole [5] - 39:9, 39:12, 52:16, 59:22, 72:9</p> <p>wide [1] - 76:23</p> <p>Wilkinson [1] - 85:24</p> <p>wish [1] - 90:25</p> <p>wished [1] - 12:25</p> <p>wishes [1] - 37:13</p> <p>withdrawn [1] - 14:23</p> <p>withheld [1] - 15:21</p> <p>withhold [5] - 6:21, 16:12, 20:20, 60:9, 84:15</p> <p>withholding [3] - 75:14, 76:4, 89:22</p> <p>witnesses [1] - 8:10</p> <p>women [1] - 69:14</p> <p>Women [6] - 5:7, 21:12, 31:16, 41:21, 48:24, 50:1</p> <p>wondering [1] - 16:1</p> <p>word [4] - 23:2, 30:5, 41:18, 45:4</p> <p>words [1] - 41:14</p> <p>works [2] - 19:15, 34:14</p> <p>world [10] - 16:18, 32:17, 32:20, 33:2, 36:14, 38:24, 42:21, 42:22, 43:20, 92:2</p> <p>worried [1] - 39:2</p> <p>worry [1] - 73:3</p> <p>wreak [1] - 92:2</p> <p>wrenching [1] - 72:12</p> <p>write [3] - 27:22, 28:6, 44:1</p> <p>writes [1] - 37:23</p> <p>writing [3] - 3:7, 34:19, 81:25</p> <p>writing's [1] - 41:1</p> <p>written [7] - 53:3, 65:11, 78:24, 89:25, 90:3,</p>	<p>90:14, 90:23</p> <p>wrongly [1] - 65:16</p> <p>wrote [4] - 65:13, 68:21, 68:23, 85:24</p>	
	V		W	Y	
	<p>vague [2] - 16:2, 44:20</p> <p>vaguely [1] - 40:22</p> <p>valid [1] - 58:19</p> <p>various [5] - 27:23, 59:9, 78:7, 79:4, 79:5</p> <p>verse [3] - 55:5, 84:7</p> <p>versus [16] - 2:4, 17:20, 18:8, 25:6, 50:19, 52:3, 62:8, 64:11, 67:18, 69:21, 75:3, 78:9, 85:12, 85:23, 87:6, 88:16</p> <p>vested [2] - 6:9, 42:20</p> <p>vestige [1] - 12:9</p> <p>veto [1] - 24:22</p> <p>view [9] - 23:10, 30:11, 36:3, 47:1, 59:2, 71:20, 73:12, 77:15, 82:21</p> <p>views [1] - 45:5</p> <p>violate [3] - 8:4, 8:6, 53:16</p> <p>violates [3] - 13:20, 55:10, 84:24</p> <p>violating [2] - 7:19, 11:12</p> <p>violation [2] - 9:5, 85:17</p> <p>vires [3] - 7:17, 7:23, 14:2</p> <p>Virginia [2] - 10:15, 10:17</p>	<p>wait [6] - 27:14, 35:20, 37:9, 37:12, 47:7, 91:5</p> <p>waited [1] - 37:15</p> <p>waiting [1] - 56:7</p> <p>waived [1] - 90:19</p> <p>walk [3] - 31:11, 54:24, 68:24</p> <p>Walker [1] - 77:19</p> <p>Wall [1] - 1:15</p> <p>wall [2] - 34:19, 41:1</p> <p>wants [7] - 13:17, 16:10, 19:13, 30:22, 38:13, 38:20, 50:18</p> <p>warning [1] - 7:5</p> <p>warrants [1] - 61:2</p> <p>Warth [1] - 88:16</p> <p>Washington [1] - 1:21</p> <p>watch [1] - 86:7</p> <p>watching [1] - 3:24</p> <p>water [1] - 58:1</p> <p>ways [6] - 23:8, 44:1, 44:12, 44:22, 54:24, 63:16</p> <p>wean [1] - 73:16</p> <p>wearing [1] - 4:16</p> <p>websites [1] - 23:15</p> <p>week [1] - 14:15</p> <p>weigh [2] - 83:19, 86:20</p> <p>weighing [2] - 59:9, 85:1</p> <p>weighs [1] - 86:25</p> <p>welcome [4] - 3:11, 3:15, 9:17, 91:23</p> <p>welfare [1] - 20:25</p> <p>well-being [1] - 86:13</p> <p>well-settled [1] - 13:15</p>			<p>yanked [1] - 20:23</p> <p>year [2] - 16:4, 57:15</p> <p>years [1] - 73:14</p> <p>yield [1] - 86:10</p> <p>York [5] - 1:13, 1:16, 10:13, 17:20, 24:6</p> <p>young [3] - 57:15, 63:15, 86:1</p> <p>Youngstown [3] - 17:18, 24:2, 24:4</p> <p>youth [6] - 57:7, 63:10, 63:16, 87:13, 89:4</p>
				Z	
				zeros [1] - 16:4	
				§	
				§ [1] - 92:19	